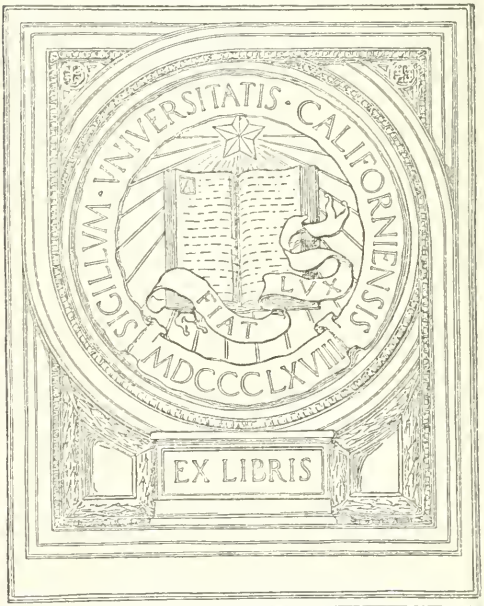

CLAIMS AGAINST MEXICO

A BRIEF STUDY OF THE INTERNATIONAL LAW APPLICABLE TO CLAIMS OF CITIZENS OF THE UNITED STATES AND OTHER COUNTRIES FOR LOSSES SUSTAINED IN MEXICO DURING THE REVOLUTIONS OF THE LAST DECADE.

BY
RAOUL E. DESVERNINE
of the New York Bar

With a Foreword
BY
LINDLEY M. GARRISON

Private Edition
1921

To

My Respected Uncle,

DR. PABLO DESVERNINE,

One-time Minister to the United States and recently
Secretary of State of the Republic of Cuba.

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FOREWORD.

Whatever views may be entertained as to the advisability of the United States entering into what have been termed "entangling alliances" with other nations, the desirability of closer commercial relations between all nations and between the nationals of the nations can hardly be doubted. We, in the United States, have shown a national reluctance toward learning International Law, but closer commercial relations will inevitably require from us a greater knowledge of this subject than has heretofore been necessary. Among other things we must become familiar with the rules which obtain where nationals of one government have claims against another. To this end the careful study and the concise statement, of certain principles of international law made by the author of this work will be found to be of great use. While this work by its title, specifically covers only claims against one particular government, that of Mexico, the underlying principles discussed are universal in their application. It is much to be regretted that the inclination of our citizens to confine themselves too much to their own interests and to those of their country has led them to neglect the acquisition of knowledge concerning other countries and of those broad principles of law which underlie international dealings. The size of our country and its rapid development have tended to make us too self-centered. The self-interest, however, involved in acquiring and creating foreign trade is rapidly causing a change, and treatises such as this one are of great value in helping this change to come about. This volume, in addition to its general value, has, it seems to me, a great and unique usefulness in the specific field it assumes to cover. Mexico seems to be attaining her equilibrium at last and it is hoped that she will soon resume her normal position in the family of nations. It will be necessary for Mexico in order to regain her normal position in the world to meet fully all her obligations, more especially those toward any

who have legitimate claims against her. This book presents the fundamental rules and considerations which govern the subject of claims, and points out the proper course to be pursued in the presentation and prosecution of such claims with the hope that an orderly procedure will ensue and that the claims will be adjudicated fairly and equitably. The arrangement seems to me to be excellent, and the treatment of the subject-matter as comprehensive as possible in a volume of such small compass, and its usefulness unlimited within its field. I feel a certain degree of pride that one of my partners has made this unique and valuable contribution to an important subject.

LINDLEY M. GARRISON.

New York City,
May 20, 1921.

PREFACE.

The misunderstanding between Mexico and other nations in the matter of claims for losses sustained during the Mexican revolutions since 1910 has been intensified by the failure of many statesmen, politicians and publicists, particularly in Mexico and the United States, to reach conclusions in accordance with well-settled principles of international law and sound diplomatic practice. When occasion has arisen for a determination of policy, tragedy has several times threatened because eloquence displaced clear thinking and judicial deliberation.

Many estimates of the damages sustained by aliens in Mexico have been made, but these estimates at best are but guesses. Strange though it may seem, there has heretofore been no attempt to collect the principles of international law applicable particularly to the Mexican situation, and to view the issue of responsibility and liability, and to measure the recoverable quantum of damage, with such a codification as a foundation.

In the preparation of this volume there has been little occasion for originality. Practically the entire subject is governed and controlled by diplomatic precedents readily available to the student and discussed in the works of authorities. This treatise is not, therefore, a composition, but a compilation. Selection has been made, wherever possible, of international precedents covering controversies to which Mexico has been a party, and because of the peculiar position of the United States under the Monroe Doctrine, particularly of precedents between the United States and Mexico; furthermore, it has not been possible within a volume of this size to exhaust the subject or even to indicate the law applicable to every possible type of claim. The intention has been to include only the major classes of claims.

Whenever possible, only well-settled principles of international law have been stated. When, on any question, there

has been room for a fair diversity of opinion, an effort has been made to express both sides with equal force unless a conclusion seemed necessary by a distinct overbalancing of the logic of one view or of the precedents supporting it.

It is universally recognized that Mexico cannot come to the fullest development of her wonderful resources and to her highest evolution as a State, except through the aid of foreign capital and enterprise. This aid will surely be available only upon a renewal of normal relations with the rest of the world. Only when other nations are satisfied that their citizens, holding claims against Mexico, are in a fair way to be accorded justice, will the resumption of normal relations and the consequent development of Mexico begin. It is believed that even so moderate an effort as the present one, to codify or indicate the principles of international law applicable to the claims situation, will help materially to hasten the day when Mexico will come to an understanding with her sister nations and agree upon a basis for an adjudication of the claims.

It is with a sincere belief in the possibilities of Mexican development, a development unquestionably dependent upon a resumption of normal relations with her sister states, that this volume is offered.

This book was rendered possible by the collaboration of Mr. René A. Wormser, with whom I share credit for any merit which it may deserve.

RAOUL E. DESVERNINE.

24 Broad Street, New York City.
May 18th, 1921.

CLAIMS AGAINST MEXICO.

CHAPTER I.

RESPONSIBILITY.

A.

IN GENERAL. THE MODERN TREND TOWARD RESPONSIBILITY.

The natural evolution of international law has been accompanied by a gradual extension of the protection accorded citizens abroad and a corresponding extension of the principle that the State is responsible for the maltreatment of aliens within its borders. Before the beginnings of closer international relations, the State was law unto itself and aliens within its confines were in a position inferior to nationals, being at first even treated as outlaws.[1] Gradually the status of aliens improved until, at the present time, an alien, under well recognized principles of international law, is entitled, at the very least, to the treatment accorded nationals.

The exponents of the theory, that it is an assault upon the sovereignty of the State to hold it internationally accountable for the treatment accorded aliens within its borders, and that such matters should be left entirely to the discretion of the sovereign power, are now distinctly in the minority.[2] The generally accepted theory of international responsibility holds that there are certain fundamental rights of the individual alien which must be respected by all states.

"States are legal persons and the direct subjects of international law. They are admitted into the international community on condition that they possess certain essential characteristics, such as a defined territory, independence, etc. In addition, they must mani-

1 A very clear story of the development of the protection of aliens may be found in Borchard's "Diplomatic Protection of Citizens Abroad," particularly in Section 17.

2 Mr. Julius Goebel, Jr., in an article "International Responsibility of States" in VIII American Journal Int. Law, p. 802, traces the development of the modern theory of responsibility, and presents many evidences of its general acceptance.

test their power to exercise jurisdiction effectively and, as we shall see, to assure foreigners within it of a minimum of rights. This minimum standard below which a state cannot fall without incurring responsibility to the other members of the international community has been shaped and established by the advance of civilization and the necessities of modern international intercourse on the part of individuals. The home state of the resident alien is concerned not with the legal legitimacy of a foreign government, but with its actual ability to fulfill the obligations which this international standard imposes upon it. The resident alien does not derive his rights directly from international law, but from the municipal law of the state of residence, though international law imposes upon that state certain obligations which under the sanction of responsibility to the other states of the international community, it is compelled to fulfill. When the local state fails to fulfill these duties, 'when it is incapable of ruling, or rules with patent injustice,' the right of diplomatic protection inures to those states whose citizens have been injured by the governmental delinquency.

"International law recognizes on the part of each member of the family of nations certain norms or attributes of government for the purpose of assuring the rights of the individual. The independence of states, with the right of administering law and justice uncontrolled by other states, is one of the norms by which this end is attained. In countries which habitually maintain effective government, the protection of the national government of a resident alien is usually limited to calling the attention of the local government to the performance of its international duty. The right, however, is always reserved, and in the case of less stable and well-ordered governments frequently exercised, of taking more effective measures to secure to their citizens abroad a measure of fair treatment conforming to the international standard of justice. While the right of every state to exercise sovereignty and jurisdiction within its territory over all persons within it is recognized, foreign nations retain over their citizens abroad a protective surveillance to see that their rights as individuals receive the just measure of recognition established by the principles of international law. Diplomatic protection, therefore,

is a complementary or reserved right invoked only when the state of residence fails to conform with this international standard.

"The rules of international law in this matter fall with particular severity upon those countries where law and administration frequently deviate from and fall below this standard; for the fact that their own citizens can be compelled to accept such maladministration is not a criterion for the measure of treatment which the alien can demand, and international practice seems to have denied these countries the right to avail themselves of the usual defense that the alien is given the benefit of the same laws, the same administration, and the same protection as the national.

"The broad principle of international law that when an individual establishes himself in a foreign state he renders himself subject to the territorial jurisdiction of that state and must normally accept the institutions which the inhabitants of the state find suitable to themselves, must be viewed in its relation to the complementary principle that the individual in question still owes allegiance to his own state and will be protected by that state when his rights, as measured not by the local, but by the international standard, are invaded."[3]

Alpheus Henry Snow, in an article, "The American Philosophy of Government,"[4] expounds the nature of these fundamental rights.

"The truth seems to be that when an individual claims that his fundamental rights have been infringed by a government, whether the government is his own or a foreign one, he appeals neither to international law nor to national law, but to a law which is supreme over all peoples and all nations, and which grows out of our common human nature and the nature of human society. This law no people or nation can 'create'; it can only 'recognize' it. As respects rights that are not fundamental,—that is, which are artificial or remedial, each individual is subject to the rules of international law or of national law according to the nature of the case and according to the citizenship of the parties. But as respects his fundamental rights, each individual and each gov-

3 Edwin M. Borchard "Basic Elements of Diplomatic Protection of Citizens Abroad," 7 Amer. Jour. Int. Law, p. 517.

4 Amer. Jour. Int. Law, p. 201.

ernment is subject to the rules of the fundamental and universal law which is supreme over both international and national law, and is pervasive throughout the whole society of peoples and nations regardless of national limits. Though the American people have in fact secured the fundamental rights of the individual by our own national law, through constitutional prohibitions, we do not regard these fundamental rights as created either by our own national law or by international law, but by a law universally pervasive and supreme over both, which we 'recognize,' and which we consider that we must recognize on penalty of reversion to barbarism. One may adopt the religious hypothesis and call this supreme universal law the law of God, or the philosophical hypothesis and call it the law of nature, or the juridicial hypothesis and call it the law of human society. Perhaps the simplest way out of the difficulty of determining the source of this law is to regard it as a law made by human society as an organized unitary community, and to call it 'the fundamental law,' understanding by this that law which is supreme over all other human law, whether international, national or municipal, and which deals directly with the rights of the individual man as a human being as against all human society. As Bonfils and Fauchille say, slavery is abolished everywhere because society in general feels that it is in violation of fundamental rights of the individual merely as a human being regardless of the citizenship, and hence destructive of all human society. That there are rights of the individual which he has merely as a human being and which follow him throughout the world, is proved by the fact that each enlightened human being, if he searches his own conscience, finds himself compelled so to believe. The existence of this law cannot be proved by ordinary methods of proof. It must be accepted as an axiomatic and self-evident truth."

It must be said, however, that the student of international law is often forced to the conclusion that the fundamental rights, so much discussed by jurists, are neither as easily enumerated nor as clearly defined, in many instances, as most of these writers would have one believe. What is more unfortunate in the view of those who seek clarification of international jurisprudence, is the fact that the so-called international rights represent generally

the rights insisted upon, for its citizens, by a stronger government against a weaker. After all, these international rights vary with the changing conceptions of national government, and of the relation of the individual to the group, entertained by the society of the more conservative nations. The world does seem to be drifting steadily toward an increase in the control permitted to exist by society over its individuals; and with this drift there must eventually come a change in the degree to which a nation will be held internationally accountable because of the control which it exercises over its inhabitants. Fundamental international rights there are, but they change and evolve in a gradual way, so that, at a given time, the quantum of these rights, as a practical matter, represents the commonly accepted ideas of the family of strong nations on the subject—these nations impressing their mutual will upon the rest of the world.

In recent years, the United States has developed a greater realization of the necessity of international responsibility to the rapid development of amity between nations. The Great War, and the peculiar position taken by the United States in it, raised this nation to a high plane of moral leadership in world affairs. On the other hand, the Mexican revolutions since 1910 have drawn Mexico away from world events; and, forcing the nation's attention almost exclusively on domestic affairs, have induced an unbalanced and unnatural increase in the nationalistic spirit of the government and people. We encounter, then, a difference of philosophies—the United States with a nationalism intense enough, but modulated by its recent participation in world events to a greater appreciation of internationalism, and Mexico with its nationalism intensified to a point where, in its aggravated state, nationalism has almost eclipsed internationalism.

The rule that the fundamental rights of the individual must be respected, is accompanied by the rule that a State will generally be held responsible only for the measure of protection of the rights of foreigners which it is able to exercise in view of the circumstances and its condition. It is almost solely in the interpretation and application of these rules that authorities differ and diplomatic departments of governments come to issue.

The Supreme Court of the United States in the case of Logan

v. The United States[5] held that there are certain fundamental rights, recognized and declared but not granted or created by the Constitution, and thereby guaranteed against violation or infringement by the United States, or by the States, as the case may be, and some observe that these "fundamental rights" are not limitable by municipal regulation.

In the case of Kepner *v.* United States[6], the Supreme Court of the United States gave its approval to a collation of the provisions of the Constitution of the United States made in the instructions of the President to the Commission for taking over the civil government of the Philippines from the Military Authorities, dated April 7, 1900. The instructions read[7]: "There are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar."

The collation is as follows:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence or be compelled in any criminal

5 144 U. S. 263, 293.
6 195 U. S. 100, 123.
7 Opinion of Justice Day, p. 122.

case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; but no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

Justice Day, in his opinion, comments as follows upon this collation:

"These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the Thirteenth Amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, s. 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution; and embody almost verbatim the safeguards of that instrument for the protection of life and liberty."

(The Supreme Court has held these constitutional prohibitions to be "fundamental rights."[8])

The Mexican Constitution, in Chapter 1, of Title 1, contains provisions varying but little, in essence, from those of the Constitution of the United States protecting fundamental rights, and, with a few exceptions, to be found principally in Article 27, the Mexican Constitution may be considered in accord with that of

8 See Kepner v. United States, 195 U. S., 100, 123; Dorr v. United States, 195 U. S. 138, 144, 148; Hawaii v. Mankichi, 190 U. S. 197, 217.

the United States. It is interesting to note, however, that the Mexican Constitution of 1917 differs from its predecessor of 1857 in several important respects on the subject of fundamental rights. Section 1 of Title 1 of the Constitution of 1857 is entitled: "Of the Rights of Man." The first article of this section reads as follows: "The Mexican people recognize that the rights of man are the basis and object of social institutions. Consequently they declare that all the laws and all the authorities of the country must respect and maintain the guarantees which the present constitution grants." This provision seems to be a recognition of the fundamental rights internationally accorded man and known to Anglo-Saxon constitutional law as the Bill of Rights provisions.

The Constitution of 1917 adopted a new title for the corresponding section, calling it "Title 1, Chapter 1, Of Personal Guarantees." That this change was not accidental but intended, is indicated by the changed wording of Article 1 of this chapter: "Every person in the United States of Mexico shall enjoy all guarantees granted by this Constitution; these shall neither be abridged nor suspended except in such cases and under such conditions as are herein provided." A comparison of these sections of the two constitutions is likely to convince the reader that the Constitution of 1917 was adopted by a nation which had, through its years of revolution and political turmoil, lost its sense of internationalism and had come to an unduly intensified nationalism. Article 1 of Section 1 of Title 1 of the Constitution of 1857 undoubtedly expressed, in conformance with the basic philosophy of its creators, the intention that the subsequently enumerated rights of the individual should serve merely as a collation, as accurate as possible, of the fundamental rights of man, which are supreme over any constitution. The Constitution of the United States, by the Ninth Amendment, guarantees to the people their fundamental rights in so many words:

"The enumeration and the constitution of certain rights, shall not be construed to deny or disparage others obtained by the people."

Article 1 of Chapter 1 of Title 1 of the Mexican Constitution of 1917 indicates an intention on the part of its creators, to dis-

tinctly limit the fundamental rights of man to the particular rights enumerated in the Constitution.

A comparison of the terms of the two constitutions at length is not here possible. Suffice to say, the language of the Constitution of 1917, when compared with the language of the corresponding sections of the earlier constitution, does substantiate the theory above advanced that the creators of the existing constitution intended to limit individual rights to those specifically enumerated therein.

If it is true that there are fundamental rights which are not created by legislation but can only be recognized by it, it would seem that the present Mexican Constitution, in so far as it attempts to make its enumeration of fundamental rights exclusive, cannot succeed.

As a matter of fact, there is very little actual conflict between jurists and statesmen in regard to the existence of particular fundamental rights. Consequently, the constant utterance by publicists and statesmen of the commonly-accepted, platitudinal principles of constitutional and fundamental law, are of no particular value. It is in the application of the commonly-accepted principles that the conflict arises. When the difference is between Latin and Anglo-Saxon jurists, conflict in interpreting these fundamental principles is probably to be accounted for largely by the influence, respectively, of the Civil law and the Anglo-Saxon common law.

It is unfortunately true that in many instances the more powerful nations, while insisting on the responsibility of weaker states, have denied responsibility when they themselves were indicted. The diplomatic history of the United States presents examples of this inconsistency. This country has always been ready to press claims for injuries and has been uniformly successful in obtaining acknowledgments of liability, but has occasionally repudiated liability when itself called to account, even where it has actually granted indemnity. Cases of this latter variety are the Spanish Claims of 1850, the Italian Lynchings and the Chinese cases. This inconsistent policy of the United States and other nations has been a great discredit to their statesmanship and much to be regretted as an obstacle to the clarification of international law.

The Latin-American countries have been the staunchest supporters of the theory of non-responsibility. They have been forced to this stand by the frequency with which they have been visited by insurrections, uprisings and banditry, and have, by necessity, been compelled to develop, through their statesmen and publicists, a justification for their reiterated attempts to deny liability.

Furthermore, Latin-America objects to the theory of responsibility because of the conviction existing in the countries of the south that the enforcement of international responsibility is usually only a pretext for the securing of economic advantages to the citizens of the interposing nation. The Latin-Americans fear a loss of sovereignty and independence through the frequent application of the theory of responsibility. Mexicans, especially, seem to believe that "might makes right" is the foundation of the responsibility theory, and that the United States, in particular, usually acts to her own advantage and with no consistent adherence to international and moral principles. It is unfortunate that this misinterpretation of the motives of the United States exists in Mexico. The United States has occasionally misapplied international law, and has in several instances been guilty of breaches of good international practice; but it is undoubtedly true that the record of the United States in its foreign relations, when compared with those of others of the powerful nations, is surprisingly free from unfairness or international injustice. The resentment of Mexicans and other Latin-Americans toward foreign interposition has some ground in fact, because this interposition has often been arbitrary, impolitic and abusive. But it is submitted that this resentment against diplomatic interposition by the United States is not well grounded in fact.

There is small justification in modern international law for the constant attempts of Latin-America to avoid liability; and these attempts at the repudiation of responsibility have invariably proved futile.

B.

THE ATTEMPT OF LATIN-AMERICAN STATES TO EVADE INTERNATIONAL RESPONSIBILITY BY MUNICIPAL OR CONSTITUTIONAL REGULATION.

Latin-American history since 1852, when Venezuela tried to spread the idea through Latin-America, presents a consistent attempt on the part of many of the more tempestuous and revolution-ridden of the Latin-American states to evade international responsibilities through the insertion, in treaties contracted between themselves, and in their constitutional law and municipal law, of provisions limiting the state liability for injuries to aliens.

The Institute of International Law in 1909 expressly condemned the making of treaties relieving nations of responsibility as creating bad precedents. However, the parties to treaties limiting the rights of the respective nationals of one country in the territory of another, would be bound thereby. Regulations of municipal and constitutional law of the kind described above have proved futile against the claims of citizens of European states and of the United States.

Mexico's most recent attempt to thus evade international responsibility is found in the new Constitution of 1917, Article 27, which reads in part as follows:

"Legal capacity to acquire ownership of lands and waters of the nation shall be governed by the following provisions:—

"1. Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in the Republic of Mexico. The Nation may grant the same right to foreigners, provided they agree before the Department of Foreign Affairs to be considered Mexican in respect to such property, and accordingly not to invoke the protection of their Governments in respect to the same, under penalty, in case of breach, of forfeiture to the Nation of property so acquired."

The above constitutional provision has been characterized by

Mexicans as one of the triumphs of the revolution, and as a destroyer of the alleged favoritism shown to foreigners under the regime of the late Porfirio Diaz, equalizing the position of nationals and foreigners in the enjoyment of property rights.

Such regulations and provisions are in contravention of established rules of international law and are ignored or denied by the non-Latin-American States of the world.

"The United States has vigorously opposed the attempt of the Latin-American countries to pass upon the scope of their international duty. As was said by Secretary of State Bayard, in 1887:

> 'If a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties.'

"The principle that equality of treatment between nationals and aliens releases a state from pecuniary responsibility for injury to aliens is conditioned upon the fact that its administration of justice satisfies the standard of civilized justice established by international law. Foreign states, however, undertake to judge for themselves as to the local state's compliance with international standards—a defect in the system which arbitration has done much to remedy.

"The United States has never taken the position that one who acquires a residence in a foreign country does so at his peril and assumes the risk of ill-treatment or injury identically with citizens. Where a state does not normally possess or is not disposed to employ sufficient power to prevent injury to the alien, the state's responsibility is considered as established; the delinquency may occur either in its legislative, executive, or judicial departments. One reason why the alien is not bound to submit to unjust treatment equally with nationals, against which the national has no judicial redress, is because the latter is presumed to have a political remedy, whereas the alien's inability to exercise political

rights deprives him of one of the principal safeguards of the rights of the citizen. For this reason diplomatic interposition may be invoked by the alien for the enforcement of his rights. The alien, therefore, is not bound to accept the treatment accorded to nationals if such treatment is in violation of the ordinary principles of civilized justice, and notwithstanding the fact that the national has no immediate remedy against the injustice."[1]

Whether or not limitations in the constitutional or municipal law of one Latin-American state would be binding upon the others having similar limitations on the rights of aliens, is a debatable question. In the case of those nations which adopted the resolutions of the several Pan-American Congresses on claims and diplomatic intervention wherein attempts were made to incorporate into "American Law" limitations on the rights of aliens, it might be successfully contended that the signatory nations were bound morally and in international law by these regulations, at least as against each other.

1 Borchard's Diplomatic Pro. of Cit. Ab., pp. 104 to 107.

C.

DE JURE, DE FACTO AND LOCAL DE FACTO GOVERNMENTS. BRIEF REVIEW OF MEXICAN HISTORY BEGINNING WITH THE OVERTHROW OF DIAZ. A DISCUSSION OF THE NATURE OF THE SUCCESSIVE GOVERNMENTS AND REVOLUTIONARY BODIES AND OF THE LIABILITY OF THE PRESENT GOVERNMENT FOR THE ACTS OF EACH.

Before summarizing the recent historical events in Mexico and their results as affecting the liability of the government it will be well to point out the respective character and attributes of *de jure* and *de facto* governments. A *de jure* government, as the term implies, is a legal government which has succeeded to the sovereign power by legal means, while a *de facto* government is one actually holding the reins of power while not of legal origin. A usurping government which has overturned the existing legal order and succeeded to the actual power would be *de facto.* Whether or not a *de facto* government exists is a question of fact. Elements determining its existence are the extent and supremacy of its power, acknowledgment by the people of this power, and the recognition accorded it by foreign nations. A *de facto* government may develop into a *de jure* government, the transition being brought about generally by its continuance in the saddle, the sustained support given it by the nation and the recognition accorded it by foreign powers.

It is important to note that the burden of establishing the *de facto* nature of the government and its consequent liability falls on the claimant. Recognition by the claimant's nation does not prove its *de facto* character. It is a question whether or not failure of the claimant's country to recognize the *de facto* nature of a revolutionary government precludes the claimant from asserting its *de facto* character.

Both *de jure* and *de facto* governments succeed to the liabilities and obligations of previous *de jure* or *de facto* governments. In addition, upon the success of a revolutionary movement, respon-

sibility for the acts of the revolutionists becomes merged into the liability of the *de facto* government created by the revolution.

The principles briefly discussed above in respect of *de facto* governments apply only to general *de facto* governments. An important distinction between these and local *de facto* governments must be made. The latter are characterized as exercising control over part of the country only. The liability of the federal government for the acts of the local *de facto* government is generally denied.

"A temporary occupant or local *de facto* government carries on the functions of government, supported usually directly or indirectly by military force. It may appoint all necessary officers and designate their powers, may prescribe the revenues to be paid and collect them, and may administer justice. Foreigners must perforce submit to the power which thus exercises jurisdiction, and a subsequent *de jure* government cannot expose them to penalties for acts which were lawful and enforced by the *de facto* government when done. The temporary *de facto* government may legislate on all matters of local concern, and in so far as such legislation is not hostile to the subsequent *de jure* government which displaces it, its laws will be upheld. A military occupant as a general rule may not vary or suspend laws affecting property and private personal relations or those which regulate the moral interests of the community. If he does, his acts in so doing cease to have legal effect when the occupation ceases. Political and administrative laws are subject to suspension or modification in case of necessity.

"The collection of taxes and customs duties within the territory and during the period of occupancy of the local *de facto* government relieves merchants and tax-payers from a subsequent second payment upon the same goods to the succeeding *de jure* government. Such a temporary government may levy contributions on the inhabitants for the purposes of carrying on the war, but they must not savor of confiscation. It may seize property belonging to the state and may use it. It may receive money due the state and give receipts in the name of the state. This, however, applies only to debts payable within the territory and period of occupancy.

"Debts due by the state cannot be confiscated or the interest sequestered by a temporary occupant, and private property must be respected. The occupant or local *de facto* government cannot alienate any portion of the public domain. The fruits thereof may be sold, but only that part accruing during the period of occupancy. A local *de facto* government may become the owner of movables, which it may sell and hypothecate. A succeeding government takes such mortgaged property as rightful owner subject to the liens thus created in good faith. As a general rule, however, a succeeding *de jure* government is not liable for debts contracted by a displaced local *de facto* government. A person dealing with a local *de facto* government assumes the risk of his enterprise. The *de facto* government may issue paper money, and private contracts stipulating for payment in such money will be enforced in the courts of the succeeding *de jure* government. Under compulsion, a government has at times admitted liability for the wrongful acts of previous local *de facto* governments."[1]

Porfirio Diaz was elected in 1910 to his eighth term as President of the Republic of Mexico. Shortly after his election an insurrectory movement started in northern Mexico which increased in momentum and finally led to the resignation of Diaz on March 18, 1911, and the designation of Francisco de la Barra as President *ad interim*. De la Barra's short administration was that of a *de facto* government. Madero, who had headed the revolutionary movement against Diaz was elected on October 15th to the presidency and continued the *ad interim de facto* government, succeeding thereby to the obligations and liabilities of the regular *de jure* Diaz government as well as of the *de facto* de la Barra government. Madero did not control the whole country. Large sections of Mexico were in continued and open revolt against him from the very beginning of his regime. It can hardly be doubted that his was the *de facto* central government, but having at no time been in control of the entire country it might seriously be doubted that his government was responsible for the acts of the scattered outstanding revolutionists. However, as most of these revolutionists joined in one of the later revolutions and so

1 From article by Edwin M. Borchard in the Chicago Legal News, May 31, 1917, "International Pecuniary Claims Against Mexico."

aided in effecting the overthrow of the central government, liability for the larger part of the acts of these revolutionary bodies eventually became merged in the central government through its participation in eventually successful revolutionary movements.

On February 8, 1913, Victoriano Huerta who commanded the government forces deserted his chief and went over to the rebels. The revolution was carried into Mexico City, led chiefly by Huerta and Felix Diaz, a nephew of the former President. Madero was captured and forced to resign on February 13, 1913. Several days thereafter Madero and Vice-President Suárez were shot and killed. Under the Mexican Constitution the succession went to Pedro Lascuráin, the Minister of Foreign Affairs, who appointed General Huerta Minister of the Interior. Lascuráin then resigned and Huerta became provisional president. Thereafter the United States consistently refused recognition to Huerta, although recognition was accorded him by several of the other Powers.

In the meantime Venustiano Carranza had started a revolution in the State of Coahuila, of which he was Governor. On March 26, 1913, he proclaimed the "Plan of Guadalupe," which asserted that Huerta had acted treasonably and which named Carranza First Chief of the Constitutional Army and depositary of the executive power when that Army should occupy Mexico City. Villa, Zapata and other revolutionists later joined Carranza and contributed to the success of his movement. It seems clear, then, that for the acts of these other revolutionary leaders and their followers committed in aid of Carranza's revolutionary movement, his government, upon succeeding to the *de facto* control of the country, was responsible. For their acts after Carranza's acquisition of the central power, a different rule would apply. Carranza's government would probably be absolved from liability regarding the acts of these revolutionary bodies committed after his entry into Mexico City on the ground that they consisted of independent revolutionary movements not acting with him but acting against him.

President Wilson's attempt in July, 1913, to volunteer the good offices of the United States in the political confusion by sending to Mexico the Hon. John Lind, formerly Governor of Minnesota,

proved fruitless, and President Wilson continued in his speeches terming Huerta as "a mere military despot."

In April, 1914, occurred the regrettable Vera Cruz incident and intervention by the United States. The events which followed resulted successively in the forced resignation of Huerta, the setting up of the makeshift government of Francisco Carbajal and the proclamation of General Gutierrez as provisional president. Villa and Zapata agreed to the selection of Gutierrez as President, but Carranza refused to give up his claim to the presidency. After considerable turmoil and some fighting Carranza's supporter, Obregon, defeated Villa at Celaya on April 2, 1915, and broke the opposition to Carranza's supremacy. On October 19th the Carranza government was recognized by the United States as the "*de facto* Government of Mexico."

On August 31, 1917, Carranza's government received the *de jure* recognition of the United States.[2]

With the beginning of 1920 opposition to Carranza was quietly but surely intensifying. When, in March, Carranza presented Bonillas as a candidate for the presidency, he hastened his own destruction. On April 9th the leaders of the forthcoming revolution—de la Huerta, Calles, Salvador Alvarado, Obregon and others,—issued the plan of "Agua Prieta," declaring President Carranza's attitude and conduct unconstitutional and proclaiming support of the 1917 Constitution. The revolution spread until Carranza was compelled to flee on May 9th. On May 22nd Carranza was killed. Thereafter de la Huerta was duly and legally elected provisional president under section 84 of the 1917 Constitution. In September, 1920, General Alvaro Obregon, at a popular election, was overwhelmingly elected President of the Republic. He was inaugurated on December 1st, 1920.

In accord with the general principles of governmental succession and the liability of the succeeding government for the acts of its predecessors, the present government of President Obregon, *de jure*, though unrecognized as yet by the United States, would succeed to the liabilities of the previous de la Huerta and Carranza regimes. In the liabilities of the Carranza regime would be included liability for the acts of the revolutionists who joined or

2 See Oetjen v. Central Leather Co., 246 U. S. 297.

aided in the overthrow of General Huerta. Similarly in the liabilities to which the Obregon Government would succeed from the de la Huerta Government would be included the liability arising from the acts of those revolutionists who aided or joined in the overthrow of General Carranza.

It is well settled that a nation is not responsible for the acts of, and services rendered to, revolutions which, though ultimately unsuccessful, were, at the time of the acts or services, beyond the power of the government to control, and so the Mexican Government would clearly not be liable for the acts of, and services rendered to, any of the revolutionary bodies committed or rendered during a period when this movement had temporarily been beyond suppression by the federal government, and which had not participated in any revolution which was eventually successful in succeeding to the Federal *de facto* or *de jure* power. However, it is equally clear that the government created through revolution is responsible as well for the acts of and services rendered to the revolution as for those of the preceding *de facto* or *de jure* government. It is interesting to note here that the successful revolutionists would even appear to be bound from the beginning of their movement by the stipulations of previously existing national treaties.

The acts of a general *de facto* government would undoubtedly bind succeeding governments, but as above noted the liability of the succeeding general government for the acts of a local *de facto* government is greatly limited. The administration of Huerta presents interesting questions in view of this rule. Grave doubts have been expressed regarding the legality of Huerta's assumption of power. If the procedure above described made him a legitimate constitutional President his government undoubtedly would have bound the nation. If he was merely a usurper, his government probably, at its inception at least, ruled as a *de facto* government. While his government probably started as a general *de facto* government it became gradually weakened through the growing success of the opposition and became eventually nothing more than a local *de facto* government. As against those countries which recognized Huerta's as the general *de facto* government it would probably be difficult for any successor Mexican administra-

tion to limit its liabilities arising out of the Huerta regime on the theory that it was eventually only a local *de facto* government. However, against the United States, and such other governments as refused to recognize Huerta in any way, this theory should be successfully applied in limiting the Federal government's responsibility for the acts of and services rendered to General Huerta, at least during the latter part of his administration.

It is interesting to note, in this connection, that in all the recent conversations between representatives of the Mexican Government and other persons regarding the external debts of Mexico, there has been a studied purpose to omit Huerta's bonds from consideration. Carranza's Government consistently took the position of not recognizing the validity and legality of Huerta's loan and considering it as no binding obligation of the Mexican Government, though Carranza never showed the slightest intention to repudiate or deny any of the other external debts of Mexico.

The responsibility of the Mexico of today for the acts of all the administrations since the fall of Diaz, except that of Huerta's, is clear. As above indicated, however, there is a fair possibility that the Mexican Government may be able successfully to deny responsibility for the acts of Huerta's revolution and administration.

CHAPTER II.

DIPLOMATIC INTERPOSITION.

A.

DENIAL OF JUSTICE AS A GROUND FOR DIPLOMATIC INTERPOSITION.

Diplomatic interposition by the home government may be either in protection of the rights of the State itself, with which form of interposition we are not here particularly concerned, except as it affects the presentation of claims by individuals or in protection of individuals and their international rights as individuals in a foreign land. This latter variety of interposition is always based on a denial of justice to the individual.[1] The term "justice" is best measured by a comparison of the treatment accorded nationals with that accorded foreigners, except in those situations where the treatment of nationals does not reach the standard of the generally recognized "rights of man"[2] which are internationally binding on all states—on the enlightened ones by common consent, and on the less-enlightened states by the force, moral and physical, of the stronger and more enlightened.[3]

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1 See Mr. Jefferson, Sec. of State, to Mr. King, Dec. 7, 1793, 5 MS. Dom. Let. 388 and Mr. Jefferson, Sec. of State, to the At. Gen., Mar. 13, 1793, 5 MS. Dom. Let. 70; Mr. Fish, Sec. of State, to Mr. Foster, min. to Mexico, No. 21, Aug. 15, 1873, MS. Inst. Mex. XIX, 18, citing Calvo, Droit Int. II, 397; Bradford, At. Gen., 1794, 1 Op. 53. See to the same effect, Black, At. Gen. 1859, 9 Op. 374; Mr. Evarts, Sec. of State, to Mr. Langston, min. to Hayti, No. 23, April 12, 1878, MS. Inst. Hayti, II, 136; same to same, No. 50, Dec. 23, 1878, id. 160; Mr. Davis, Act. Sec. of State, to Mr. Langston, No. 187, Aug. 27, 1882, id. 299; Mr. Evarts, Sec. of State, to Mr. Fairchild, min. to Spain, Jan. 17, 1881, MS. Inst. Spain, XVIII, 591; VI, Moore's Int. Law Dig., §986.

2 Fiore Sections 67, 68, 69, gives a not entirely inclusive list. See also Chapter I, part A.

3 In connection with this subject see Chapter I A.

B.

CONDITIONS PREREQUISITE TO DIPLOMATIC INTERPOSITION.

I.

Nature of the Claim and Status of the Claimant as Affecting the Right to Interposition.

Citizenship is an absolute prerequisite to diplomatic interposition. A nation will not, nor may it, interpose in behalf of a person not its own citizen.[1] It is solely within the discretion of the claimant's government to decide whether or not the claimant is a citizen, but claims commissions, notably the Spanish Treaty Claims Commission, have often admitted evidence pro and con to determine the citizenship of the claimant. Where unnaturalized Cubans were serving in the United States Army they were held not to be entitled to diplomatic aid in the presentation of claims against Spain arising from the Cuban laws.[2] It has been generally held that citizenship of the wife follows that of her husband,[3] but the United States might well insist on a change in this rule in view of the recent amendment of the Constitution admitting women to suffrage. Injuries to seamen and soldiers by mobs, in riots and at the hands of insurrectionists, present cases, under certain circumstances, where recovery may be had as if the injured parties had been civilians.[4] But the general rule is that applied by the Spanish Treaty Claims Commission:—that members of military forces injured in the line of their duty cannot make claim against a foreign government.[5] A declaration of intention to become a citizen is not sufficient.[6] Naturalization is never retroactive in its effect and an injury occasioned before naturalization will not be made the basis of diplomatic representation.[7]

International claims are not assignable and no diplomatic as-

1 204 MS. Dom. Let. 532, 6 Moore's Digest 631.

2 230 MS. Dom. Let. 378, 6 Moore's Digest 631.

3 Bodenmuller v. U. S., 1889, 39 Fed. Rep. 437; 6 Moore's Digest 630.

4 MS. Inst. Chile XVII. 416, and For. Rel. 1901, App. 362.

5 McCann v. U. S., 30 Spanish T. C. Commission, 6 Moore's Dig. 632.

6 153 MS. Dom. Let. 194, 195; Sen. Doc. 287, 57th Cong. First Sess.; For. Rel. 1899, 440 et seq.; For. Rel. 1900, 715-773; 6 Moore's Dig. §980.

7 6 Moore's Dig. §981, and precedents cited.

sistance will be given the assignee of even a completely just claim.[8] Nor will a claim derived from partnership associations be diplomatically aided.[9] However, intervention in behalf of a partnership is proper when its partnership interests have suffered injury.

It is well settled law that "a government may intervene in behalf of a company incorporated under its laws or under the laws of a constituent state or province."[10] Since the famous Delagoa Bay case[11] intervention in behalf of national (American) stockholders in a foreign (Mexican) company has been considered in accord with good diplomatic practice, where the international rights of the stockholders have actually been abridged. In the later case of "El Triunfo Company,"[12] the Salvadorean government contended "that the case as one affecting a Salvadorean corporation was exclusively for the Salvadorean courts," but the United States Government took the ground that the American citizens who were the substantial owners of the enterprise were injured and denied justice by the Salvadorean government, and having no other recourse should be protected by their home government. A majority of the arbitrators appointed under a protocol concluded at Washington, December 19, 1901, concurred in an award of damages, saying in their opinion, "We have not discussed the question of the right of the United States under International Law to make reclamation to these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well understood Delagoa Bay Railway Arbitration."[13]

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8 6 Moore's Dig. §982.

9 6 Moore's Dig. §983.

10 6 Moore's Dig. §984; see also, Borchard, Dip. Prot. Cit. Abroad, §279 et seq.

11 Moore Int. Arbitra. II, 1865-1899, For. Rel. (1902) 848-852 Moore's Dig. vol. 6, pp. 647-649.

12 Moore's Digest, Vol. 6, pp. 649-651.

13 Moore's Dig. Vol. 6, p. 651. At the end of the discussion on this case, Moore has the following note:

"At page 846 Judge Penfield, Solicitor of the Department of State, in a report to Mr. Hay, Secretary of State, says: 'While the Department does not dispute the contention that intervention by the Government of the United States would not be in entire accord with certain dicta expressed in the case of the Antioguia in respect of intervention in behalf of American stockholders in a foreign corporation, it is consistent with the actual grounds of that decision. But if all the reasons stated in that case against the right of intervention were to be accepted, even if intervention had been refused solely on the academic reasons given, the decision of this case would be controlled by the later decision of the Department in the case of the Delagoa Bay Railway.'"

Other societies and unincorporated bodies are generally not proper claimants for injuries to persons or on lives lost.[14]

2.

When Local Remedies Must First Be Exhausted.

Some authorities insist that in no case is there an absolute obligation on the claimant to first exhaust his local remedies.[1] The State itself, and not the individual alone, is injured by an injustice to its citizen abroad and can of its own right diplomatically interpose—this is the theory advanced by these authorities and it is probably fundamentally sound. However, the rule is generally accepted that recourse must first be had to the local remedy before diplomatic assistance can be rightly invoked.[2]

It has been the established practice of the United States to adhere firmly to this general rule in the case of claims by foreigners against the United States,[3] and it has also been followed by this country in the case of claims of citizens of the United States against foreign governments.[4]

Despite the general acceptance of the rule above, states have frequently resorted to diplomatic interposition in behalf of their citizens abroad under an exception to this rule that local remedies

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14 See article, Vol. I, A. J. I. L., p. 8.

1 See, "International Responsibility of States" by Julius Goebel, Jr., in VIII A. J. I. L., p. 802.

2 The principle that local redress must first be sought has been so frequently reiterated that no attempt will here be made to collect a large number of citations. Many may be found in 6 Moore's Dig. §987.

3 Randolph, At. Gen., 1792, 1 Op. 25; Lincoln, At. Gen., 1803, 5 Op. (App.) 692; Ackerman, At. Gen., 1871, 13 Op. 547; Butler, At. Gen. 1837, 3 Op. 254; Mr. Buchanan, Sec. of State; Dec. 26, 1846. MS. Notes to Gt. Britain, VII, 149, 6 Moore's Dig. 659; Mr. Seward, Sec. of State, to Lord Lyons, Jan. 12, 1863, MS. Notes to Gr. Brit. IX, 402; Mr. Olney, Sec. of State, to the President, Feb. 5, 1896, For. Rel. 1895, I, 251, 259; H. Doc. 225, 54 Cong. 1 Sess.; VI, Moore's Dig. §987.

4 Ackerman, Atty. Gen., 1872, 13 Op. 554; Mr. Buchanan, Sec. of State, to Mr. Larrabee, Mar. 9, 1846, 35 MS. Dom. Let. 426; Mr. Fish, Sec. of State, to Mr. Ruger, Oct. 21, 1869, 82 MS. Dom. Let. 224; Mr. Davis, Act. Sec. of State, to Mr. Taylor, Oct. 20, 1871. 91 MS. Dom. Let. 154; Mr. Fish, Sec. of State, to Mr. Becker, May 3, 1871. 89 MS. Dom. Let. 250; Mr. Olney, Sec. of State, to Mr. Dessaw, Nov. 19, 1896, 214 MS. Dom. Let. 66; VI, Moore's Dig. §987.

need not first be sought when there is little or no possibility of securing redress.[5] This exception has been tersely stated by Mr. Fish, the United States Secretary of State,[6] as "a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust."

In the case of Messrs. Ulrich and Langstroth, who made claim against the Mexican Government for losses inflicted, and forced loans imposed by insurgents at Monterey, the United States Government interposed in behalf of the claimants on the theory that they had been denied an opportunity of proving their case.[7]

The good sense of this exception to the rule above is scarcely to be doubted. There are certainly situations where the foreigner can only be protected by the immediate interposition of his home Government. But this right of interposition should be used with great caution. It is a dangerous world policy that would permit a nation, except in the most evidently necessary situations, to arrogate to itself the right to judge the standards of justice applied by a sister nation. International comity demands, in all cases where there is not some perfectly obvious and undeniably serious flaw in the local machinery of justice, that the alien be forced by his home Government to seek local redress before interposition will be undertaken in his behalf. Secretary of State Seward of the United States[8] officially took notice of the dangers of permitting an arbitrary interposition under the above exception to the rule respecting local redress, as follows:

"We are unfortunately too familiar with complaints of the delay and inefficiency of the courts in South American republics. We must, however, continue to repose confidence in their independence and integrity, or we must take the broad ground that these states are like those of oriental semi-civilized countries—outside the pale within which the law of nations, as generally accepted by Christendom, is understood to govern. The people

5 See Mr. F. W. Seward, Act. Sec. of State, to Mr. Gibbs, min. to Peru, No. 133, Feb. 10, 1879, MS. Inst. Peru, XVI, 381; Lord Palmerston, in the House of Commons, June 25, 1850, on the case of Don Pacifico, Hansard, Parl. Debates, CXII, 382-387.

6 MS. Inst. Venezuela II, 228.

7 6 Moore's Dig. 678-80.

8 Instruction to Mr. Burton, Minister to Colombia, on April 27, 1866, No. 137 Diplomatic Correspondence 1866, III, 522-23.

who go to these regions and encounter great risks in the hope of great rewards, must be regarded as taking all the circumstances into consideration and cannot with reason ask their government to complain that they stand on a common footing with native subjects in respect to the alleged wants of an able, prompt, and conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies."

Where a government has superseded local remedies with others, the alien is, of course, not obliged to resort to local remedies first,[9] and where the local remedy is in the nature of an appeal to a commission of nationals, diplomatic action is not precluded by the existence of such a commission.[10]

As a corollary of the generally recognized duty to seek local redress first when possible, an unjust judgment is not internationally binding.[11] "The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law."[12] The United States refused to recognize the validity of judgments of the British Prize Courts which violated settled principles of international law.[13] A judgment should not, however, be questioned on purely technical grounds.[14]

The following excerpt from an article by Elihu Root,[15] entitled "The Basis of Protection to Citizens residing Abroad," is a valuable commentary on this subject:

"* * * The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another

9 See citations in 6 Moore's Dig. §989.

10 6 Moore's Dig. §990.

11 See discussion of judicial acts in Chapter IV, part C.

12 Wharton's Int. Law Dig. II, 671; See Wheaton, Lawrence's Ed. of 1863, pp. 673-4, citing Grotius de Jur. Rel. Ac. Pac., Lib. III, cap. 2, Sec. 5, No. 1; See also, Bynkershock, Quaest. Jur. Pub. Lib. 1, cap. 24, and Vattel Droit des Gens, Liv. 11, Ch. 18, Sec. 350; See also, Mr. Fish, Sec. of State, to Mr. Nelson, min. to Mexico, Jan. 2, 1873, MS. Inst. Mex. XVIII, 357; Mr. Evarts, Sec. of State, to Mr. Foster, min. to Mexico, April 19, 1879, MS. Inst. Mex., XIX, 570; VI, Moore's Dig. §991.

13 See "British Prize Court Decisions in the Chicago Packing House Case," by Chandler P. Anderson, XI, A. J. I. L. 269.

14 Report of Mr. Olney, Sec. of State, to the President, Feb. 5, 1896, in relation to the case of John L. Waller, H. Doc. 225, 54 Cong. 1 sess. 7; For. Rel. 1895, I, 257-258.

15 Vol. IV, A. J. I. L. 521.

country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

"There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. In the famous Don Pacifico case, Lord Palmerston said, in the House of Commons:

> 'If our subjects abroad have complaints against individuals, or against the government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere. But there may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said: "We do not apply this rule to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."
>
> 'I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of the country; but that in cases where redress can not be so had—and those cases are many—to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive. * * *
>
> 'We shall be told, perhaps, as we have already been

told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.'[16]

Nations to which such observations apply must be content to stand in an intermediate position between those incapable of maintaining order, and those which conform fully to the international standard. With this understanding there are no exceptions to the rule and no variations from it.

* * * * * * *

"The most frequent occasions of appeal by citizens for protection in other countries arise upon the assertion that justice has been denied them in the courts, and this appears, unfortunately, to be a frequent occurrence. * * *

"A large proportion of such complaints are, however, without just foundation. Citizens abroad are too apt to complain that justice has been denied them whenever they are beaten in a litigation, forgetting that, as a rule, they would complain just the same if they were beaten in a litigation in the courts of their own country. When a man goes into a foreign country to reside or to trade he submits himself, his rights, and interests to the jurisdiction of the courts of that country. He will naturally be at a disadvantage in litigation against citizens of the country. He is less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices, and often with the language in which the business is done and the proceedings carried on. It is not the duty of a foreign country in which such a litigant finds himself to make up to him for these disadvantages under which he labors. They are disadvantages inseparable from his prosecuting his business in a strange land. A large part of the dissatisfaction which aliens feel and express regarding their treat-

16 See Hansard, Parl. Debates CXII, 382-7.

ment by foreign tribunals results from these causes, which furnish no just ground for international complaint. It is very desirable that people who go into other countries shall realize that they are not entitled to have the laws and police regulations and methods of judicial procedure and customs of business made over to suit them, or to have any other or different treatment than that which is accorded to the citizens of the country into which they have gone; so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens, a system of law and administration which does not violate the common standard of justice that is a part of international law; and so long as, in conformity with that standard, the same rights, the same protection, and the same means of redress for wrong are given to them as are given to the citizens of the country where they are. On the other hand, every one who goes into a foreign country is bound to obey its laws, and if he disobeys them he is not entitled to be protected against punishment under those laws. It follows, also, that one in a foreign country must submit to the inconvenience of proceedings that may be brought in accordance with law upon any *bona fide* charge that an offense has been committed, even though the charge may not be sustained. Nevertheless, no violation of law can deprive a citizen in a foreign country of the right to protection from the government of his own country. There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished except in accordance with law, or without such a hearing as the universally accepted principles of justice demand. If that right be denied to the most desperate criminal in a foreign country, his own government can and ought to protect him against the wrong."

Unjust discriminations in the execution of local justice will form a basis for national interposition.[17] Mr. Bayard, United States Secretary of State, in a letter to Mr. Copeland, Feb. 23, 1886,[18] declining to present the claim of the petitioner for the

17 Mr. Fish, Sec. of State, to Mr. White, Jan. 7, 1874; MS. Inst. Arg. Rep. XVI, 57. Opinion of Dr. Francis Wharton, Solicitor of the Dept. of State, in the case of William A. Davis v. Great Britain, 1885, cited in Mr. Day, Act. Sec. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228.

18 159 MS. Dom. Let. 138.

murder of his father in Mexico, said: "By the principles of international law, accepted by both Mexico and ourselves, we can no more permit ourselves to seek redress for injuries inflicted by private individuals in Mexico on one of our citizens, than we could permit Mexico to intervene to seek redress for injuries inflicted on Mexicans by private individuals in the United States. The rule is that, where the judiciary is recognized in a country co-ordinate with the executive, having committed to it all suits for redress of injuries inflicted on aliens as well as on citizens, then the judiciary and not the executive must be appealed to for redress. There are, it is true, two exceptions recognized to this rule: First, when there is undue discrimination against the party injured on account of his nationality; secondly, where the local tribunals are appealed to, but justice was denied in violation of those common principles of equity which are of the law of nations."

Under a decree dated October 1, 1918, President Carranza established a Claims Commission, composed of nationals, for the purpose, as stated in Article II, "of passing upon claims for injuries to individuals or to property, occasioned by the revolutionary movements which took place in the Republic during the years 1910-1917." The time within which claims must be presented to the Commission, under the terms of the decree establishing it, has recently been extended a year. A discussion of this Commission and its work is not particularly valuable. As mentioned somewhere above, diplomatic action is not precluded by the existence of the unused remedy of an appeal to a local commission of nationals,[19] and arrangements will probably have to be made between Mexico and the countries whose citizens have claims against her, whereby an appeal to Carranza's Commission will not be a prerequisite to the presentation of a claim to the Commission which will eventually adjudicate these claims against Mexico. Indeed, it is very probable that in the ultimate protocols or agreements certain classes of claims will be enumerated in regard to which no local remedies whatsoever will need to be exhausted.

19 6 Moore's Digest, §990.

CHAPTER III.

THE PRESENTATION AND ADJUDICATION OF INTERNATIONAL CLAIMS.

International claims may, of course, be presented to the local government for relief. In the event of an actual or anticipated defect in local justice, or in case the injury complained of is an injury at the same time to the rights of the claimant's government, claims may be presented to the home State Department, and, if adjudged by it to be worthy and valid, should be presented diplomatically to the foreign government. "In a * * * communication, the Department of State explained that claims against the Government could be presented only in one of two ways: (1) Either by the claimant's availing himself directly of such judicial or administrative remedy as the domestic law might prescribe; or (2) in the absence of such remedy, if the claimant was an alien, by his government 'formally presenting the claim as an international demand to be adjusted through the diplomatic channel.' "[1]

In order to secure the approval of a Department of State the claim must present merely *prima facie* evidence of good cause, such as would ordinarily, in a private law action, authorize an equity court to issue *ex parte* process. An exhaustive examination of the merits of a claim will not generally be made until a contest arises upon presentation of the claim to the other government. A *prima facie* case must be made out, however.[2]

We are not here concerned with claims which are presented to the local government for settlement by the individual foreigner. We need discuss in this section, consequently, the procedural aspects of the settlement of such claims only, as have already been

1 Moore's Digest, Vol. VI, p. 608, quoting Mr. John Davis, Act. Sec. of State, to Baron de Fava, July 9, 1884, MS. Notes to Italy, VIII, 92. See also Mr. Olney, Sec. of State, to Mr. Smythe, min. to Hayti, No. 136, March 20, 1896, MS. Inst. Hayti, III, 479. See also, Mr. Gresham, Sec. of State, to Mr. Smythe, tel., March 21, 1895, MS. Inst. Hayti III, 439.

2 Mr. Bayard, Sec. of State, to Mr. Denby, Feb. 5, 1886, MS. Inst. China, IV, 118. See also, Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, No. 69, Jan. 9, 1886, MS. Inst. Turkey, IV, 366.

placed in the hands of the home government of the foreigner claimant or of such claims as are the subject of arbitration or settlement between nations.

In recent years many disputes between nations have been amicably settled by resort to the mechanics of The Hague court. Others, as in the case of the Aslop claims, where the United States and Chile appointed Edward VII of England as mediator, have been settled by the appointment under a protocol of an *Amicable Compositeur*. Some disputes between the Latin-American States have been settled by the Pan-American Court of Arbitration. It is quite possible that a body under the League of Nations may begin to function in the near future as an arbitrator of international disputes, but it can hardly be expected that a smooth arbitration system will be developed under the League in time to adjudicate the claims against Mexico. Furthermore, neither the United States nor Mexico is represented in the League of Nations at the time of writing, and it is hardly possible that claims of United States citizens against Mexico will be submitted for settlement by these two countries to a body not as yet supported by them. It is submitted that the most satisfactory and probably the eventual method of settling the claims against Mexico will be found in the creation of a mixed claims commission.

Mexico has several times experienced a Mixed Claims Commission for the settlement of claims against her. A "Convention for the Adjustment of Claims of Citizens of the United States Against Mexico" was concluded on April 11, 1839, and proclaimed April 8, 1840. Under this Convention the claims were referred to a Board of four commissioners, two selected by each country and the King of Prussia was designated to appoint an arbitrator and umpire. A "Convention for the Settlement of Claims," signed by the United States and Mexico July 4, 1868, and proclaimed February 1, 1869, provided for a Board of two Commissioners with an umpire to settle the disputed questions. On March 2, 1897, the United States and Mexico again signed a Claims Convention called the "Protocol Concerning Claims of Oberlander and Messenger." This was no Mixed Claims Commission, however, as it provided merely for the selection of an arbitrator. On May 22, 1902, there was signed by the two countries the famous "Pro-

tocol for the Adjustment of Certain Contentions Arising under what is known as the 'The Convention of the Californias.'" This protocol provided for four commissioners, two to be selected by each country, and none to be nationals of the contending countries, with an umpire to be selected under the rules of The Hague Conference.[3]

A Convention between the United States and Mexico[4] was signed at Washington on March 24, 1908, and proclaimed on June 29, 1908. This was one of the Arbitration Treaties contracted by Root while Secretary of State. Article 1 of this Treaty reads as follows:

> "Differences which may arise whether of a legal nature or relating to the interpretation of the treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, in case no other arbitrator should have been agreed upon, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided that they do not affect the vital interest, independence, or the honor of either of the contracting parties and do not prejudice the interests of a third party."[5]

The Convention of 1908, quoted above, is still binding on Mexico and the United States, but its wording permits the establishment of a Mixed Claims Commission. Augustus O. Bacon, U. S. Senator from Georgia, pointed this out in an Article—"The Senate Amendments to the Arbitration Treaties," published in the North American Review.[6] In discussing the difference between the two treaties negotiated by Secretary of State Knox and the twenty-five negotiated by Root, he says as follows:

"In each of the 25 Root treaties it is agreed that the interna-

3 These Conventions and Protocols have been published by the Government Printing Office at Washington.

4 Treaty Series No. 500 U. S. Government Printing Office.

5 The Second and Fourth Articles of this Convention provide for a method of procedure and ratification respectively. Section 3 states that Article XXI of the Treaty of Guadalupe Hidalgo signed on February 2, 1848, shall remain in effect. This Article XXI provides for the peaceful settlement of disputes but is rather weak inasmuch as it permits either of the two nations to reject arbitration if it is "deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

6 Republished as Senate Document No. 654, 62nd Congress, Second Session—quoted from page 3.

tional differences shall be referred for settlement to the Permanent Court of Arbitration at The Hague. In the 2 Knox treaties it is provided that these international differences shall be referred to this court at The Hague 'or to some other tribunal,' as may be decided by the parties in each case. This difference in the terms, respectively, of the Root and Knox agreements is inappreciable, and is unimportant in view of the fact that in case of any difference arising between the United States and any one of these 25 nations it would be perfectly competent, if desired, for the parties to agree to refer the same for settlement to some other tribunal than the Permanent Court at The Hague."

A Mixed Claims Commission is generally organized under a convention or protocol of the two governments concerned, such a convention or protocol being substantially an agreement to arbitrate claims of citizens of the one State against the other.. Details regarding procedure vary. It is customary to agree to the appointment of two commissioners or arbitrators, one by each of the executives of the two nations, with a provision that the two executives, or the two commissioners, shall between them select a third commissioner, usually a citizen of a third nation, to act as umpire and having the decisive vote in case of a disagreement between the other two arbitrators. In the convention between the United States and Mexico, signed July 4, 1868, it was provided that the two commissioners first sit on all the claims and that they appoint an umpire, merely for the settlement of the disputed claims. In the event of their failing to agree on an umpire, it was provided that they each appoint a representative, and that it be decided, for each disputed claim, by lot, which representative should sit as arbitrator. The convention between the United States and the Republic of Chile, signed at Santiago, August 7, 1892, and ratified January 26, 1893, established, it is submitted, a better procedure, inasmuch as it provided that, upon the failure of the two executives to select a third commissioner within three months, said third commissioner would be selected by a third party—in this case, the President of the Swiss Confederation.

The present claims controversy presents the situation, however, of claims by more than one government against Mexico.

To cover this situation, one of several courses might be adopted. The other claimant governments could under an arrangement with the United States and in compliance with one interpretation of the Monroe Doctrine turn over the prosecution of their claims to the United States Government. It is doubtful, however, whether the United States would consent to this procedure. A second plan might be the appointment of a commissioner by each of the claimant governments to sit with the Mexican Commissioner and the umpire on the respective claims presented by his government. These two plans seem to be preferable to a possible third, that of establishing separate commissions for the consideration of the claims of each government, as they would simplify the work for the Mexican Government.

To assure the claimants a fair opportunity to present their claims adequately, it is necessary to secure to them in the protocol or agreement establishing the commission, the right to examine books, records and documents and to take depositions in either country. Without this right, and without a considerable amount of co-operation on the part of both Governments, it would be practically impossible in almost all instances for the claimant to properly prepare his case.

The Spanish Treaty Claims Commission, before which were brought some 542 claims based on losses or injuries suffered during the Cuban Insurrection (the claims totaling $642,931,694.51, and covering almost every possible variety of damage), consumed nine years "in the reception, examination and adjudication of these claims."[7] In the words of the final report of the Commission "perhaps two years might have been saved, if, at the beginning, there had existed practical methods for procuring testimony in Cuba and Spain." The following excerpt from the same report will serve to illustrate the difficulties which should be anticipated upon the organization of the claims commission:

"Sources of Evidence.

Soon after the organization of the commission it was ascertained that practically all of the evidence on which the cases would be tried would come from four sources, namely, the records of the State Department, the Spanish

7 Senate Document 550, 61st Congress, 2d Session.

archives in Madrid, witnesses in Cuba and Spain, and witnesses in the United States. Under the organic act, it was provided that 'all reports, records, proceedings, and other documents now on file or of record in the Department of State or in any other department, or certified copies thereof, relating to any claims prosecuted before said commission shall be furnished to the commission upon its order.' An order was thereupon issued for certified copies of all such documents. The State Department was without funds for this purpose, and the work of securing these records was delayed until an appropriation was made therefor by Congress.

Methods for Procuring Testimony.

The act creating the commission empowered it to appoint one or more commissioners to take testimony. There was no trouble or delay in this respect, so far as taking depositions in the United States was concerned, but it was soon apparent that there existed no practical method of taking depositions in foreign countries. It was also apparent that a large majority of the witnesses upon whom both claimants and the Government must depend resided either in Cuba, where the losses occurred, or in Spain, to which the armies of that Kingdom, in Cuba during the insurrection, had returned at the close of the Spanish-American war. The laws of practice and procedure of Spain and Cuba were so radically unlike those of this country that it was practically impossible to procure testimony except by complicated methods, involving great delay and expense, and in a form wholly inadequate to bring about a full and fair trial of the cases.

The complications were multiplied by the fact that the testimony of these witnesses would necessarily be in the language of those countries. Fortunately, the island at the time was under the military control of the United States, and this situation was relieved, so far as taking testimony in Cuba was concerned, through the issuance, by the military government in Cuba, of Order No. 79, dated Habana, March 15, 1902, giving any commissioner duly appointed by the Spanish Treaty Claims Commission ample power to take testimony in Cuba, which order, by an enactment of Congress, known as the 'Platt amendment,' became a permanent law of that island. Further relief was given by an act of Congress approved June 30, 1902, amending the act of March 2, 1901, conferring additional powers upon the commission, and vesting it

with 'all the powers now possessed by the circuit and district courts of the United States to take or procure testimony in foreign countries,' and by an act approved June 28, 1902, authorizing the commission to appoint salaried commissioners to take testimony in Cuba, and per diem commissioners whenever necessary.

After the island was turned over to the Republic of Cuba it was soon evident, notwithstanding the enabling measures above mentioned, that they were so vaguely comprehended by the Cuban courts of the first instance it would require patient negotiations to secure the active cooperation of the judges, without which no progress in the way of taking depositions could be hoped for. The credit of overcoming obstacles is largely due to the services of Mr. David Mead Massie, of Ohio, appointed by the commission as a salaried commissioner to take testimony in Cuba, by virtue of the act of Congress above referred to."

Such a large number of claims may be expected against Mexico and the difficulties in the way of proof will be so great that an adjudication of them by a mixed commission would be a farce, unless there were incorporated in the organic act establishing the commission, clauses mandatory and binding regarding the offering and guaranteeing of facilities for securing evidence and unless there was, in addition, a whole-hearted and honest spirit of co-operation between the Governments involved that would overcome the difficulties suggested by the experiences of the Spanish Treaty Claims Commission. This spirit would shorten by years the sittings of the Commission and at the same time would tend to make the adjudication of the claims equitable and fair. The technical difficulties to be overcome may not be lightly viewed and the negotiations preceding the establishment of the commission should proceed in full realization of the enormous task ahead.

It is submitted that a workable agreement providing for a mixed claims commission should include articles following the suggestions enumerated below. This list is not presented as a complete framework for a protocol, but merely an enumeration of some of the clauses considered of importance.

1. The commission should be given authority to examine

and judge by a vote of two out of the three commissioners the claims presented.

2. There should be provisions regarding procedure in case of the death of one or more of the commissioners, the places and times of meeting and of the oaths of said commissioners.

3. The Commissioners should be limited in considering evidence to that brought forward by the contending Governments, but should be bound to receive all such evidence.

4. The two governments should be permitted as counsel one person nominated by each of the two executives and the claimant himself shall be entitled to counsel. The Governments should be bound to furnish the commission, at its request, with papers in their possession which might be pertinent to the claims.

5. The decisions of the Commissioners or two of them should be final and conclusive and should be made in writing for each claim, stating the amount of the award to be made, if any, and the date from and to which interest is to run, if any.

6. A time limit should be fixed within which claims must be presented, though a provision should be added extending that time when reasons for the delay appear valid to two of the commissioners.

7. The commission should be bound to make all of its decisions within a time limit.

8. In the matter of procedure the commission should be given almost entirely full rein.

9. Provision should be made for the payment of the awards.

10. Records of proceedings and awards should be kept. Each executive should be authorized to appoint a secretary and the commission should have the power to appoint such other officers as might be deemed necessary.

11. Expenses should be divided and those of the third commissioner paid by the two Governments, but the commission's

whole expenses partly paid by reductions from the awards made to a limited percentage.

12. A method of ratification should be laid out.

13. The commission should apply, in adjudicating the claims, the well recognized principles of international law.

14. Provision should be made for examination of records and documents and the taking of depositions in both countries.

Mr. Amos S. Hershey, in the American Journal of International Law,[8] in an article on "The Calvo & Drago Doctrines," discusses the legitimacy of the average international claim in the following interesting fashion:

> "While we do not deny the responsibility of governments to foreigners and their liability in certain cases, even during times of civil war and insurrection, it is certain that the major part of such demands are usually far in excess of liability and are based on erroneous principles. The following examples, selected for the most part from Moore's Work on Arbitration, may serve to illustrate the exorbitant amounts of most of these claims.
>
> "The Civil War claims of Great Britain against the United States, which were settled by a mixed commission in 1873, amounted (with interest) to about $96,000,000. Less than $2,000,000 was actually awarded to the British claimants. Of the 478 British claims, 259 were for property alleged to have been taken by the military, naval or civil authorities of the United States; 181 for property alleged to have been destroyed by the military and naval forces of the United States; 7 for property destroyed by the Confederacy; 100 for damages for the alleged unlawful arrest and imprisonment of British subjects by the authorities of the United States; 77 for damages for the alleged unlawful capture and condemnation or detention of British vessels and their cargoes as prize of war by the naval forces and civil authorities of the United States.
>
> "The claims of France growing out of the Civil War were also settled by a mixed commission which met in 1880-84. They aggregated about $35,000,000. The

8 Vol. I, p. 43.

amount actually awarded was $625,566.35, *i. e.,* less than 2 per cent of the amount demanded. Many of the claims are said to have been fraudulent and others were greatly exaggerated. Most of the awards were for injuries inflicted by the armies of the United States, *i. e.,* presumably for violations of the laws of warfare.

"The claims of the citizens of the United States against Mexico, presented to the mixed commission which met in July, 1869, and continued in session until January, 1876, amounted to the enormous sum of $470,000,000. The actual amount awarded was $4,000,000 or less than one per cent. The claims of citizens of Mexico against the United States amounted to $86,000,000. They received $150,000.

"The mixed commissions which adjudicated the claims against Venezuela at Caracas during the summer of 1903, awarded 2,313,711 bolivars to claimants of the United States out of 81,410,952 which were demanded; 1,974,818 to Spanish claimants who had demanded 5,307,626; 2,975,906 to Italian claimants who had asked for 39,844,258; 2,091,908 to German claimants who had demanded 7,376,685; 9,401,267 to British claimants instead of 14,743,572 as demanded; and 10,898,643 to Belgian claimants who had only demanded 14,921,805 bolivars. The demands of French claimants, which amounted to nearly $8,000,000 were cut down to $685,000.

"Besides being excessive in amount, it is believed that many of these claims are bottomed on fraud and tainted with illegality and injustice. It is notorious that the sums received by a government are often far below the face value of the loan and many of the claimants for losses during civil war or insurrection are not above a well-grounded suspicion of having themselves been engaged in unneutral or insurrectionary acts.

"In view of the ill-founded character of many, if not most, of such claims and of the danger of the peace and safety of the states of Latin America resulting from their forcible collection by leading European powers, the United States would be fully justified even in advancing a step beyond the Drago Doctrine and declaring formally to the world that it could not see with indifference any attempt at the forcible collection of private claims of a pecuniary nature on the Western Continent. The Monroe Doctrine, at least in its present form, forbids the further acquisition, colonization or permanent occupation of American territory by any European power, and

it is believed that such a declaration would not only be in harmony with the spirit of that doctrine but that it would lend strength to the principle of non-intervention.

"In view, however, of the fact that some of these claims may be well-founded and that the judicial tribunals in certain portions of Central America are notoriously inadequate for the impartial and effective administration of justice, and because of the frequency of revolutions, due mainly to fraudulent elections, it might be well to couple this declaration with another, insisting that all such claims be submitted to fair and impartial arbitral tribunals or mixed commissions composed of representatives from both the creditor and debtor nations.

"The United States has no desire to become a 'debt collecting agency' for European creditors or to establish a protectorate over the states of Latin America. For these reasons our government should avoid, if possible, the responsibility of an *ex parte* decision regarding the validity of these claims, although the assumption of such a burden would be preferable to their forcible collection by European powers. Our insistence upon arbitration in the case of the famous boundary dispute between Great Britain and Venezuela in 1895, points the way toward what is at once the easiest and most equitable settlement of such disputes."

There are many classes of injuries for which, under International Law, there can be no compensation. Enormous losses of these varieties have, since 1910, been sustained in Mexico and cannot, because of their nature and the peculiar circumstances involved, be repaired. Many foreigners will find, even in cases where there has unquestionably been grievous injury, that their claims will often stand upon no valid principles of legal liability. In addition, there will probably be many claims which would be thrown out by a Commission on one of the grounds discussed in Chapter V.

Various estimates have been made regarding the total number, and the aggregate sum, of the claims which will be presented against Mexico. All of such estimates are at best guesses. It is safe to say, however, that when the claims are finally adjudicated in the light of the rules of International Law, the number and amount of the claims will be shown to have been far in excess of the real liability of Mexico. It is to Mexico's interest to have

the claims adjudicated at the earliest possible moment in order that these greatly exaggerated estimates of liability will be dissipated. The establishing of Mexico's true liability and indebtedness will be a stabilizing influence both to her and to the world in general. Furthermore, no plans for the rehabilitation and development of Mexico, a rehabilitation and development in which other nations are vitally interested, will be found workable which do not include a just settlement of the claims problem. Consequently such plans are almost certainly doomed to at least partial failure until they are based no longer on estimated liability, but on adjudged indebtedness.

CHAPTER IV.

PARTICULAR CLASSES OF CLAIMS. THE RULES OF INTERNATIONAL LAW APPLICABLE TO EACH.

(A classification will be used in this Chapter which is by no means perfect and some of the groups may be found to overlap others. This classification has been intended not as an ideal division but as a convenient one. It will be noticed that only such claims are here considered as might arise as a result of the internal strife in Mexico from 1910 to date or of governmental acts during this period.)

A.

LAND, PETROLEUM AND MINERAL CLAIMS. EFFECT OF ARTICLE 27 OF THE MEXICAN CONSTITUTION OF 1917.

Where there is a conflict of laws, questions involving land are governed by the *lex rei sitae*.[1] Local limitations on the right to hold property and on the exercise of property rights are valid and binding within the commonly accepted principles of international law, provided these limitations are placed upon nationals as well as upon foreigners, and provided they are not in violation of those rights of man (see Chapter I-A) which relate to property rights. But where there is undue discrimination against aliens, a denial of justice by the *judex rei sitae* or a violation of one of the rights of man, diplomatic intervention is not precluded. The most important of the applicable rights of man would be the following: The individual must be permitted to enjoy his property; vested rights must be recognized and not interfered with except under the police power; and no property may be confiscated without due process of law.

1 Mr. March, Sec. of State, to Mr. Selding, March 3, 1856, 45 MS. Dom. Let. 123. To the same effect, see Mr. Fish, Sec. of State, to Mr. Conkling, April 13, 1869, 80 MS. Dom. Let. 564; Mr. Fish, Sec. of State, to Mr. Wilder, May 6, 1876, 113 MS. Dom. Let. 294; Mr. Frelinghuysen, Sec. of State, to Mr. Hall, Min. to Cent. Am., June 18, 1882, MS. Inst. Cent. Am. XVIII, 245; Mr. Frelinghuysen, Sec. of State, to Mr. Scruggs, Feb. 19, 1884, MS. Inst. Columbia, XVII, 381; Mr. Porter, Acting Sec. of State, to Mr. Hall, June 9, 1885, MS. Inst. Cent. Am. XVIII, 518.

It is well to note, however, that erroneous conceptions of the meanings of the terms, "due process of law," "property," "police power" and "vested rights," and mistaken views regarding the significance of these terms in constitutional and international law are prevalent. This may be explained by the strong faith of a large part of humanity in the absolute truth of the established order and the great inertia of this group toward change. This firm belief in things as they are sways this group toward a conviction that the terms quoted above are fixed and unchanging in their connotations within the purview of both constitutional and international law. In consequence, this group attempts to limit the exercise of "police power" to a field wherein it does not infringe on "vested rights," deeming the latter to be property rights as they stand before each new contemplated restriction under the operation of the "police power."

As a matter of fact, these terms do change in their connotations.[2]

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2 In a recent opinion in the New York Supreme Court in the case of People ex rel Brixton Operating Corporation v. La Fetra, etc., Justice Giegerich discusses these terms in the following interesting fashion:

"At the outset, in the consideration of the constitutional question presented, it should be remembered that the meaning of the words police power and the meaning of the word property are not and cannot be fixed and unchanging. The two concepts are more or less in conflict, and as one is enlarged the other is sometimes correspondingly diminished. The one represents the right of the community to protect itself. The Roman maxim was **Salus populi suprema lex.** The other represents the right of the individual to dominion over such things as are permitted by the state to be the subjects of ownership. But the individual right of dominion extends only so far as the welfare of the community permits it to extend, or probably it would be more accurate to say so far as the preponderant public sentiment of the time deems that the welfare of the community can safely permit it to extend. As John Stuart Mill expresses it, 'The idea of property is not some one thing, identical throughout history and incapable of alteration, but is variable like all creations of the human mind; at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point nor on any other has the law and custom of a given time and place a claim to be stereotyped forever.' (31 Fortnightly Review, 513; Chapters on Socialism, p. 527.)

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"As industrial and economic and social conditions change, and indeed as public sentiment changes, the idea of property changes, and with it the correlated idea of police power changes.

* * * * * * * * *

"Whatever injuries an individual may suffer in the diminution of his property rights are, however, deemed to be made up to him by his sharing in the general benefits which the regulations secure to the community of which he is a member (People ex rel Nechamous v. Warden, 144 N. Y. 529, 535); * * * And it was in a still more recent case (Atlantic Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558) that the court said: 'It is settled that neither the contract clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community * * * and that all contract and property rights are held subject to its fair exercise.'"

There is a conflict between vested right and public interest which operates to alter from time to time the meaning of "property" and to change, also, the meaning of "police power."

Property rights are not inviolable when the public interest is involved. The foundation of this principle lies in the fact that the individual holds property rights at the sufferance of society and that his holding is in the nature of a public trusteeship. It is true that he may alienate and may put the property to his own use with an almost unlimited independence, but he is not permitted to work his entire free will on his property. His use and occupation is subject to certain very definite restrictions imposed by an exercise of the police power that is uniformly approved. Moreover, the exercise of the State's right of eminent domain very clearly deprives the individual of so-called vested rights in the interest of the public good. A restriction or abrogation of vested rights is not always accompanied by compensation. The taking of property under eminent domain is always accompanied by compensation to the individual, but the common restrictions on the use of property, for example, a restriction that particular industries may not be undertaken on a particular piece of property (such a restriction being just as much the taking of vested property rights as a taking under eminent domain), do not involve compensation. Moreover, all confiscations of property in the public interest are not compensated, nor need they be. When necessary sanitary measures require the confiscation of private property,[3] the State is not compelled by any nature of law, municipal or international, to compensate the individual whose property has been destroyed.

There is nothing fixed, sacred and unchangeable about the term vested. It connotes merely the substance of the tolerance of society. When society deems necessary to the general good, a change in the quantum of rights to be allowed the individual, a modification of the respective connotations of the terms vested rights, due process, and police power occurs which reduces the substance of the vested rights, lessens the restrictions of the due process and expands the police power. This process of change is no contravention of a sacred rule that rights are fixed and

3 See Chapter IV-D.

cannot be altered by the State in its development, but rather a manifestation of the undoubtedly sound rule that private rights must be subordinated to the public good.

On March 8, 1921, the New York Court of Appeals held constitutional the so-called "Emergency Rent Laws."[4] In his opinion Justice Cuthbert W. Pound says as follows:

> "The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience and the public advantage or it must be found that the State has surrendered one of the attributes of sovereignty for which Governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.
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> * * * * * * *
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> "Emergency laws in time of peace are uncommon, but not unknown. Wholesale disaster, financial panic, the aftermath of war, earthquake, pestilence, famine and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions. Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war, an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised.
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> * * * * * * *
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> "Laws directly nullifying some essential part of private contracts are rare and are not lightly to be upheld by heavy and sweeping generalization on the common good, but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise in times of emergency of the police power upon the property right and upon the contract obligation for the protection of the public weal.
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> * * * * * * *
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> "The question comes back to what the State may do for the benefit of the community at large. Here the

4 Reported in the New York Times, March 9, 1921.

legislation rests on a secure foundation. The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law."

The New York rent laws were held constitutional by the Supreme Court of the United States in the very recent case of Marcus Brown Holding Company, Inc., *vs.* Feldman, reported in the New York Law Journal of April 23, 1921.

Mexico has recently attempted, within the spirit of this modern theory of property rights and the police power, to conserve her oil and mineral resources by constitutional provision. In adopting the modern theory, she came into conflict with the rules of international law, which protect certain hard to define but nevertheless well-internationally recognized vested individual rights. An appreciation of this theory of property rights which is rapidly being adopted the world over, is necessary to a clear appreciation of the oil situation in Mexico as the Mexicans are strong contenders for this theory and as they justify their position by advancing it.

Since the birth of the new Mexican Constitution of May 1st, 1917, which superseded that of 1857 and came into effect shortly after the defeat of Huerta by Carranza's party, the oil controversy has been the most troublesome international problem in the Mexican situation. For this reason the subject is perhaps treated at greater length than the size of this volume would ordinarily warrant.

Article 27 of the new Constitution reads in part as follows:

"The ownership of lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

"*Private property shall not be expropriated except for reasons of public utility and by means of indemnification.*

"The Nation shall have at all times the right to impose on private property such limitation as the public interest may demand as well as the right to regulate the development of natural resources, which are susceptible

of appropriation in order to conserve them and equitably to distribute the public wealth. For this purpose necessary measures shall be taken to * * * prevent the destruction of natural resources. * * *. Private property acquired for the said purposes shall be considered as taken for public utility (in the public interest).

"In the Nation is vested direct ownership of all minerals * * * petroleums and all hydrocarbons—solid, liquid and gaseous.

"In the Nation is likewise vested the ownership of the water of territorial seas * * *.

"In the cases to which the two foregoing paragraphs refer, the ownership of the Nation is inalienable and may not be lost by prescription; concessions shall be granted by the Federal Government to private parties or civil or commercial corporations organized under the laws of Mexico * * *.

"Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions:

"1. Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in the Republic of Mexico. The Nation may grant the same right to foreigners provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to invoke the protection of their governments in respect to the same, under penalty in case of breach, of forfeiture to the Nation of property so acquired * * *.

"The Federal and State laws shall determine within their respective jurisdictions those cases in which the occupation of private property shall be considered as private utility * * * . *The amount fixed as compensation for the expropriated property shall be based on the sums at which the said property shall be valued for fiscal purposes in the catastral or revenue office * * * to which there shall be added ten per cent. * * *.*"

The Constitution of 1917 was not adopted by means constitutional under the old Constitution of 1857, but Mexican authorities differ in interpreting the intended character and effect of the new

Constitution. While some hold the new Constitution to be a creature fundamentally different from its predecessor and having an entirely independent origin, others maintain the new one to be in the nature of an amended edition of the old. A great many changes were made, some of them, like several in Article 27, very radical changes, but a comparison of the two constitutions will show that the general plan and numbering of the older one was followed throughout that of 1917, and the substance in general as well. The intent that the Constitution of 1917 should be in the nature of an amended edition of the older one is important in determining questions of constitutional construction.

By decrees and regulations promulgated since the establishment of the new Constitution, Article 27, or that part of it referring to subsoil rights, has been interpreted retroactively as well as prospectively, and it has been this retroactive interpretation which has been the main subject of international dispute in the oil controversy.

The Mexican Government undoubtedly has the moral and the international right to regulate the holding of property and the conservation of its mineral resources in any way it sees fit, provided there is no unjust discrimination against foreigners and provided, also, there is no violation of international rights. Consequently, a prospective interpretation of Article 27, which would apply its provisions only to subsoil rights acquired after May 1st, 1917, would be no violation of international rights.

"It is the duty of every state to determine the property which may be possessed or owned, establish the legal means of acquiring and disposing of property, and assume the exercise and enjoyment of all the rights of the owner, placing the foreigner in the same position as the citizen with respect to the local law and regulations."[5]

"Legislative jurisdiction must be recognized on the part of the territorial sovereignty in the following respects:

* * * * * * *

> "(d) To limit the exercise and enjoyment of rights over property with a view to safeguarding the public interest and the organization of landed property and to assure the protection of the rights of property.

5 Fiore's "International Law Codified," tr. by Borchard, p. 453.

"(e) To regulate the effects of possession and the legal consequences arising from a state of facts and relations established between persons and property within the national territory."

* * * * * * *

"Legislative jurisdiction concerning property situated in the territory of the state, considered objectively, must be ascribed exclusively to the territorial sovereignty.

"This sovereignty has not only the power to determine the legal status of property, but has also the power to fix the conditions necessary for the validity of rights *in rem* and to determine the legal resource which the owner may have as to his own property or that of others situated within the national territory."[6]

Retroactive interpretation of Article 27 under the theory that it was a necessary measure for the conservation of the national resources, would be valid enough, in international contemplation, if such interpretation were combined with the procedure followed in the case of condemnation under the right of eminent domain, when the taking of vested property must always be compensated.[7] Unfortunately, this solution is not a very practical one in view of the present financial situation of Mexico.

But a bare retroactive interpretation not combined with compensation for those deprived of their property rights vested before the enactment of Article 27, is a clear breach of international law and is a ground for diplomatic intervention by the home Governments of foreigners holding such previously vested rights. Secretary of State Blaine of the United States in 1881 said: "* * * the proposition that a retroactive law, suspending at will the simplest operations of justice, could be applied without question to an American citizen, is one to which this government would not give anticipatory assent."[8] "Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as, in the case

6 Fiore, pp. 450 and 451.

7 See Borchard's Dip. Pro. of Cit. Ab., pp. 125-7 and 182.

8 Mr. Blaine, Sec. of State, to Mr. Lowell, Min. to Gr. Brit., May 26, 1881, For. Rel. 1881, 530; Moore's International Law Digest.

of the alien resident, no treaty stipulation or principle of international law is contravened."[9]

"The legislature is an organ of the state for whose acts the state is directly responsible. It has been noted that in municipal law no action lies against the government for acts of legislation unless the statute itself or the constitutional law of the state so prescribes. But a statute is no defense against a breach of international obligations. When acts of legislation,—among which may be included administrative decrees and ordinances having the force of law—have been deemed violative of the rights of aliens according to local or international law, foreign governments have not acquiesced in the theory of the non-liability of the state and have on numerous occasions successfully enforced claims for the injuries sustained by their subjects."[10]

It would not be a difficult matter for Mexico to retain the benefits of Article 27 and at the same time avoid a violation of vested rights and a consequent breach of international law.

Article 14 of the Constitution of 1917 runs as follows:

> "No law shall be given retroactive effect to the prejudice of any person whatever.
>
> "No person shall be deprived of life, liberty, property, possessions or rights without due process of law instituted before a duly created court in which the essential elements of procedure are observed in accordance with previously existing laws * * *."

If the above Article should apply to Article 27, a retroactive interpretation of the latter would be clearly illegal. Article 14 of the previous Constitution of 1857, corresponding to Article 14 of that of 1917, ran as follows:—

"No retroactive law shall be enacted * * *." Certainly the spirit of Article 14 is against retroactive interpretations even if constitutional. There is some doubt, however, as to whether the actual wording makes Article 14 applicable to the Constitution itself. "Law" has been variously defined and interpreted. Dictionaries give it a very wide meaning and include constitutional

9 Mr. Blaine, Sec. of State, to Mr. O'Connor, Nov. 25, 1881, 139 MS. Dom. Let. 663; See also, Mr. Blaine, Sec. of State, to Mr. Piatti, Dec. 6, 1881, 140 MS. Dom. Let. 86; Moore's International Law Digest.

10 Borchard, Dip. Prot. of Cit. Ab., p. 181.

provisions and even customs. In the case of State *ex rel* Teague *v.* Board of Com'rs of Silver Bow County,[11] it was held that "law" as used in the Constitution, Article 5, Section 31, which provided that no law shall extend the term of office of a public officer after his election, did not refer to the Constitution. In Warfield *v.* Vandiver,[12] "law" was held not to apply to proposed constitutional amendments where the Constitution said "Bills" must be presented to the Governor before they can become "laws." On the other hand "law" has often been held to include constitutions. In Kern *v.* Arbeiter Unterstuetzungs Verein,[13] it was held that the State and Federal Constitutions are "laws" within the meaning of How. Ann. St., c. 164, Section 4, which contains provisions for beneficial associations organized thereunder, shall not make rules contrary to the laws of the United States or of that State.

As a matter of constitutional law it would not be difficult to give only a prospective interpretation to this Article; in fact, the accepted rules of constitutional and legislative construction are decidedly against an unnecessary retroactive interpretation, particularly when such a retroactive interpretation involves a taking of vested rights as the term is ordinarily understood.

"A doubtful provision will be examined in the light of prior and contemporaneous history, and of the conditions and circumstances under which the constitution was framed. The court should look to the history of the times, and examine the state of things existing when the constitution was framed and adopted, with a view to ascertaining its objects and purposes. It should consider, for example, the former law, the mischief and the remedy intended to be prevented. In such cases the relation of a doubtful provision to known political truths and to political institutions will be considered; and previous legislation and the usages of the government will also be given weight."[14]

* * * * * * *

"Many of the state constitutions contain provisions against retrospective laws. But even in states where specifically and formally prohibited, there are certain classes of retrospective laws

11 87 Pac. 450.
12 60 Atl. 538.
13 102 N. W. 746.
14 12 Corpus Juris, p. 710.

which have been sustained as valid and constitutional. The prohibition is against only such retrospective legislation as injuriously affects some substantial right of a citizen."[15]

* * * * * * *

"For the purpose of determining the constitutionality of statutes there is a strong presumption against an intent to give them a retrospective operation, which can be overcome only by the plain terms of the statute."[16]

* * * * * * *

"The adoption of constitutional provisions abrogating or otherwise affecting property rights operates prospectively and has no effect on property rights that are vested at the time of their adoption, unless it clearly appears, expressly or by necessary implication, that they were intended to operate retrospectively.

"* * * an intention to take away or destroy individual rights is never presumed; and to give effect to a design so unjust and so unreasonable would require the support of the most direct and explicit affirmation declarative of such intent. Also where great inconvenience will result from a particular construction, or great public interests will be sacrificed, that construction is to be avoided unless the meaning plainly requires such construction. And where the literal interpretation involves any palpable absurdity, contradiction, or, as it has been held, any extreme hardship or great injustice, the courts have deviated a little from the literal meaning of the words, and interpreted the instrument according to the apparent intent of its authors. But this rule should be applied with caution.

"So consideration of expediency and of sound public policy may be of determining influence in case of doubt as to the real meaning of a constitutional provision arising from the uncertainty of the language used."[17]

* * * * * * *

"The state has no power to divest or impair vested rights, whether such an attempt to do so be made by legislative enactment, by municipal ordinance, or by a change in the constitution of the state. This result follows from prohibitions contained in the con-

15 ibid, p. 1086.
16 ibid, p. 1091.
17 ibid, p. 703.

stitutions of practically all the states. Before the adoption of the Fourteenth Amendment there was no prohibition in the Constitution of the United States which would prevent the states from passing laws divesting vested rights, unless these laws also impaired the obligation of contracts, or were *ex post facto* laws; but vested property rights are now protected against state action by the provision of the Fourteenth Amendment that no state 'shall deprive any person of life, liberty or property without due process of law.' "[18]

(There is a similar "due process" clause in the Mexican Constitution—the second paragraph of Article 14 quoted above.)

The retroactive uncompensating interpretation of Article 27 cannot stand. Citizens of the United States and other countries hold large tracts of mineral lands in Mexico, acquired before the birth of the Constitution of 1917, and their respective home Governments will not countenance a confiscation of their vested rights.

It is encouraging to note that President Obregon, under pronouncement April 2, 1921, made executive declaration against a retroactive and confiscatory interpretation of Article 27, in these words:

> "The present administration believes the time has come to make known, through its foreign representatives that in order to obtain a legitimate prestige among other nations of the world, it will continue to follow a line of conduct absolutely consistent with the precepts of morals and law, which policy it adopted several months ago and demonstrated by a number of acts, and which it will continue to follow without interruption until all its purposes have been fulfilled.
>
> * * * * * * *
>
> "Extraordinary sessions of Congress are to be called to discuss principally reforms of legal character. Article 27 of the new constitution, inasmuch as oil legislation is concerned, is to be studied with a spirit of equity and its dictates to be changed so that they will be non-confiscatory nor have retroactive interpretations."

Furthermore, legislation has been introduced into the current

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18 Ibid, p. 957.

session of the legislature which will provide for the application of Article 14 to Article 27. (This action of President Obregon and the legislature follows the recommendations made to the Mexican Government by the writer.)

(If legislation is passed withdrawing the retroactive application of Article 27, and it is almost certain that such legislation will pass in the comparatively near future, a great problem will arise. What will be the rights of those foreigners who under more or less duress accepted Article 27 in its present interpretation and denounced oil properties in accordance with the procedure laid down by the Mexican Government? This problem is one of some difficulty, but no attempt will here be made to solve it.)

Having attempted to define the principles of international law applicable to the oil controversy, we come to the most difficult problem involved—that of establishing exactly what rights were "vested" when the 1917 Constitution went into effect. Rights, of course, which had not become vested on May 1, 1917, would not be protected against an application of Article 27. What class of sub-surface properties, then, should be protected as vested rights?

Under the Old Spanish Law, from which, upon the separation of Mexico from Spain, the Mexican law on this subject was derived, mineral wealth, though in the hands of private individuals, constituted the property of the Crown. No interest in the minerals as such passed under a Royal grant of the land in which they were contained, without express words designating them. By the ordinary grant of land, only an interest in the surface or soil, distinct from the property in the minerals, was transferred.

These doctrines of the Spanish Law were established at a very early period. Chief Justice Field of the California Supreme Court, in discussing the history of the Spanish and Mexican mining laws in the case of Moore *v.* Smaw,[19] says:

"By a law of the Partidas, which was promulgated as early as 1343, it was declared that the mines were so vested in the king that they did not pass in his grant of the land, though not excepted in terms: Law 5, tit. 15, p. 2. By a

19 17 Calif. 199 (1861) 79 Am. Dec. 123, at p. 127.

law of Alphonso XI, all mines of silver and gold, and of other metals, and the produce of the same, were declared to be the property of the crown, and no one was allowed to work them, except by special license or grant, or unless authorized by immemorial prescription; Rockwell's Spanish and Mexican Laws, 126. By a law of John I, this rule was modified, and a general license was granted to all persons to search for and work the mines in their own lands, and by permission of the owners, in the lands of others, and to retain one-third of the net produce, the balance to be rendered to the king; Rockwell's Spanish and Mexican Laws, 126. Under this law, few mines were discovered and worked, owing in part, as was supposed, to the fact that a great proportion of the mines of the country had been previously granted to noblemen, and others with bishoprics, arch-bishoprics, and provinces, with exclusive privileges. To remove the obstacles thus interposed to the discovery and development of the mineral wealth of the country, Philip II, by a decree promulgated on the tenth of January, 1559, annulled all previous exclusive grants made by himself or his predecessors, except in those cases where the mines were at the time worked; and resumed and incorporated into his patrimony all the mines of gold, silver and quicksilver in his kingdom, wherever found, 'whether in public, municipal, or vacant lands, or in inheritances, places, and soils of individuals'; Halleck's Mining Laws of Spain and Mexico, 6. * * * From the promulgation of this decree, the ownership of the precious metals by the sovereign throughout the dominions of the Spanish monarchy was, in all subsequent legislation, fully recognized, and the policy of allowing all persons to search for, and upon discovery to work, the mines, was rigidly followed."

Ordinances pursuant to this decree were passed at various times. Without referring to their provisions, it is sufficient to state that they all proceeded upon the admitted right of the Crown to the minerals. "Those established on the twenty-second of August, 1584, and generally designated as the 'new ordinances,' to distinguish them from regulations of an earlier date known as the 'old ordinances,' whilst revoking

all previous laws, edicts, privileges, and customs, in express terms excepted the decree of January 10, 1559, so far as it vested in the crown all mines of gold and silver and quicksilver, and annulled all grants which had been previously made."[20] In Article 22 of the Royal Mining Ordinance of 1783, published by proclamation of the Viceroy throughout New Spain in January, 1784, and revoking all previous ordinances on the subject, the right is granted by the crown to denounce mineral deposits, including "bitumens and the juices of the earth." Doubtless oil would be included under this denomination.

When Mexico became independent of Spain, the Mexican Government claimed and exercised the rights and privileges of the Spanish Crown in regard to the mineral wealth within its borders. By the Amendment of December 14, 1883, to the Constitution of 1857 (Article 72, Section X of the 1857 Constitution) Congress was given the power "To enact codes of mining * * * obligatory throughout the Republic." In execution of this power, the Federal Government promulgated in 1884 a Mining Code unifying the law on this subject throughout the country.

Article 10 of the Mining Code of November 28, 1884, reads in part as follows:

> "The following substances are the exclusive property of the owner of the soil, who may, therefore, exploit and avail himself of them without the need of denouncement or special adjudication;
>
> I. The deposits of the various kinds of coal.
>
> II. * * *
>
> III. * * *
>
> IV. The salts existing on the surface, the fresh and salt waters, whether found on the surface or under the ground; *petroleum* and gaseous or thermal and medicinal water springs."

It would seem that a more emphatic statement that petroleum is "the exclusive property of the owner of the soil" could hardly be formulated. Furthermore, the Civil Code of 1870 further substantiates the provisions of the Mining Code.

20 (idem.)

Article 827 reads:

"Ownership is the right to enjoy, to use and dispose of a thing, without any other limitations than those fixed by law."

Article 828 reads:

"Property is inviolable. It cannot be occupied except for cause of public utility and upon previous indemnity."

Article 829 reads:

"The owner of land is the owner of its surface and of that which is thereunder. He may, therefore, use it and make on it all the works, plantations or excavations which he may wish, under the restrictions established under the Title of Easements, and subject to the provisions of the special Mining Legislation and the Police Regulations."

The Civil Code of 1884[21] repeated exactly the provisions established by Articles 827 to 829, inclusive, of the Civil Code of 1875.

The next Mining Code was passed in 1892. Article 4 of this law reads:

"The owners of the soil shall freely exploit, without the necessity of any special concession in any case, the following mineral substances: Mineral combustibles, mineral oils and waters, the rocks of the land, in general, which may serve as direct elements, or as raw materials for the purpose of building or ornamentation, the substances of the soil, such as earth, sands and clays of all kinds, the mineral substances for which no concession is required under Article 3 of this Law and, in general, all those not specified in said Article."[22]

It has been contended that this legislation of 1892, which merely allows the owner of the soil to *exploit* his own land for oil, and says nothing regarding his *ownership* of such subsoil wealth, impliedly changes the law in regard to his property in such deposits. It is more likely, however, that the Legislature took for granted that the owner retained the title

21 Article 729 to 731 inclusive.

22 Article 3 referred to in the above question does not contain any reference to petroleum or mineral oils.

to the subsoil deposits which had previously been granted him by the Mining Code of 1884, and merely declared his fullest right to exploit them as an incident to such ownership.

Subsequently there was passed the Código de Minería of November, 1909, which went into effect on January 1, 1910, and was in force at the time the 1917 Constitution was adopted. While this Mining Code of 1909 declares in Chapter I, Article 1, that there is in the Nation direct ownership (*dominio*) of

> "I. Ore bodies of all inorganic substances which in veins, in blankets, or in masses of whatsoever form, constitute deposits, the composition of which is distinct from that of the country rock, such as deposits of gold, platinum, silver, copper, iron, cobalt, nickel, manganese, lead, mercury, tin, chromium, antimony, zinc and bismuth; of sulphur, arsenic and tellurium; of rock-salt; and of precious stones.
>
> "II. Placers of gold and platinum."

it expressly provides in Article 2 that among those things which are "the exclusive property of the owner of the soil" shall be "ore bodies or deposits of mineral combustibles of whatsoever form or variety" and "ore bodies or deposits of bituminous substances." In this law, therefore, unlike the previous Code of 1892, and in accord with that of 1884, the stress is again placed on ownership rather than on the right to exploit. Article 2 in full reads as follows:

> "The following are exclusive property of the owner of the soil:—
>
> I. Ore bodies or deposits of mineral combustibles, of whatsoever form or variety.
>
> II. Ore bodies or deposits of bituminous substances.
>
> III. Ore bodies or deposits of salt which outcrop at the surface.
>
> IV. Springs of surface and subterranean waters, subject to the prescriptions of the general law and of the special laws on waters, without prejudice to the provisions of Article 9.
>
> V. The country rock and substances of the soil, such

as slate, porphyry, basalt and limestone, and the earths, sands and clays.

VI. Bog and residual iron, alluvial tin, and the ochres."

These Mining Codes, passed pursuant to the amendment of December 14, 1883, to the Constitution of 1857, it is contended by many North American and other foreign oil operators, changed the law of Mexico as to coal and oil deposits in that they excepted these products from the ownership of the State. It is argued that the purchase of surface rights, subsequent to this new legislation, carried with it the ownership of subsoil properties as well. If this be true, to put into effect the provisions of Article 27 of the Constitution of 1917, with regard to holdings acquired subsequent to 1884 and prior to May 1, 1917, would be to make the Article not only retroactive but confiscatory of rights perfected and vested prior thereto.

A comparison of cases decided in the United States in regard to minerals, under Statutes or grants analogous to the Mexican Mining Codes, tends to confirm the conclusions reached by a study of the words of the Mining Codes themselves.

Such cases in this country have repeatedly held that patents of land by the Federal Government under Statutes in this country analogous to the combined force of the Mexican Constitution of 1857 and the Mining Codes authorized thereby, include both surface and subsurface rights, unless the latter are specifically reserved by the Federal Government.

For example, in the case of *Moore v. Smaw*,[23] in interpreting the Act of Congress of March 3, 1851, governing land grants in California, the court held that while in the United States title to public lands may be conveyed without passing title to minerals contained therein, a patent or grant of public lands by the Federal Government to an individual under an Act containing no limitations or reservations carried all the interest of the United States in everything embraced

23 17 Cal. 199 (1861), 79 AM. Dec. 123.

within the signification of the term "land," and this included not only the face of the earth, but everything under it and over it, as in the case of an ordinary conveyance by an individual.

To that effect the Court in that case said:

"The question arises as to what passed by the patents * * * and to this question there can be but one answer: all the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term 'land'; and that term, says Blackstone, 'includes not only the face of the earth, but everything under it or over it. And, therefore,' he continues, 'if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows;' 2 Bla. Com. 19. Such is the view universally entertained by the legal profession as to the effect of a patent from the general government."

So, too, in *Hill v. Martin*[24] it was held that the sale of state public lands under a state law providing for their disposition but not reserving the minerals, passes the title to the subsoil wealth as well as the surface.[25]

In U. S. v. San Pedro & Cañon Del Agua Co.,[26] however, the Court, in passing upon a patent issued under the same Act of Congress of March 3, 1851, as that considered in Moore *v.* Smaw, decided that the title to the subsoil wealth did not pass by the issue of a patent under that act. In Moore *v.* Smaw the California Court had said that inasmuch as there was nothing in the Act of Congress restricting the operation of the patents to the interests acquired by claimants from

24 Tex. Civ. App. 1902, 70 S. W. 430.

25 Texas, unlike other Western and far Western States, was excluded from the operation of the Congressional Mining Acts, because the government never obtained any public domain within its borders. By the terms of its admission into the Union it retained all vacant and unappropriated land for the purpose of paying the debts contracted by it while an independent Republic, and has, therefore, its own mining law.

26 4 N. M. 225, (1888), 17 Pac. 337, at 405, aff'd. 146 U. S. 120.

the former government, or distinguishing the patents in any respect from the general class of conveyances made, under that designation by the United States, patents should issue to all claimants alike, whose claims have been finally confirmed, without words of reservation or limitation, "with the exception that they shall not affect the interests of third persons—an exception which would exist independent of its legislative recognition." The court in U. S. *v.* San Pedro, however, decided that the lack of a reservation regarding mineral rights in the Act of Congress of March 3, 1851, did not, by such omission, cause the passing of title to subsurface wealth in lands conveyed by patents under such act, but, on the contrary, patents issued under such an Act should be construed strictly against the grantee and where nothing in the Act is said affirmatively granting such mineral wealth no title to it should pass. The Court distinguished the case from Moore *v.* Smaw, on the ground that this was not a case of a grant of land in which mines are later found, but a conveyance of "well known mineral land," and that the early and continuous manifestation of Congress of its purpose to reserve mines would lead the Court to determine that under a general grant of confirmation they did not intend to direct the conveyance of well known and established mines of gold and silver.

Applying the doctrine of this case to the Mining Codes of Mexico, however, does not change the result reached by the rule in Moore *v.* Smaw. For if the Act of Congress of March 3, 1851, by omitting to grant or reserve subsoil rights left room for the construction of the Statutes and for a spelling out of the intention of Congress, the Mexican Mining Code of 1884 and its successors left very little doubt as to the intent of the Mexican legislative body in respect of the ownership, and exploitation by the owner of the surface, of petroleum deposits found underneath the surface.

The case does, however, make an interesting distinction when it differentiates between lands well known to contain valuable deposits and "those where at the time of the patent there is no reason to anticipate such a condition." Applied

to Mexico this would mean that oil found on lands purchased prior to May 1, 1917, but in which up to that time there had been no reason to anticipate petroleum deposits, would not belong to the owner of the surface.

It is interesting to note that on November 18, 1920, the Supreme Court of the Philippines sustained the contention of the United States Government that, under the laws in effect in the Islands when they were taken over from Spain, title to all mineral and petroleum deposits belonged to the State, that upon the acquisition of the Islands by the United States, this country succeeded to the title to all such deposits and that these deposits could only be exploited with the permission of the Government.[27] The most interesting part of this case is the fact that in it the United States took the position taken in the controversy over Article 27 by the Mexican Government.

27 The decision is reported in "La Vanguardia," a newspaper of Manila, issue of November 19, 1920.

B.

2. CONTRACT CLAIMS.

Contract claims should be divided into three classes: (1) those arising out of contracts between individuals; (2) those arising out of contracts between aliens and the Mexican Government (concessions); (3) those arising out of defaults on or alterations in the obligations of governmental bonds or bonds guaranteed by the Government. These classes will be treated separately, as they are subject to different rules of international law and practice.

1.

Contracts Between Individuals.

In the case of contracts between individuals, the government of the foreign contractor should only interpose when there has been a denial of justice or an undue delay in the administration of it in the local Mexican courts.[1]

2.

Contracts With the Mexican Government—Concessions.

Here, again, diplomatic interposition will not be made available to prevent an anticipated breach of international law. There must actually have been a breach and a denial of justice. Governments are not as zealous in pressing the claims of citizens arising out of contract as in the case of torts. An alien, entering into a contract with the Mexican Government, does so voluntarily, taking into consideration the possibilities of performance and the risks to be run. Furthermore, he submits himself to the operation of the local law when contracting abroad, and such local law gives him certain remedies which he must pursue before he may rightfully seek the aid of his home government. Besides, a government usually allows itself to be sued in one way or another, and the alien is rarely without a local remedy. Mr. Marcy,[2]

1 Moore's Arbi. 3456, 3458, 3469-70; Ralston 182.
2 Wharton II, 655.

then Secretary of State of the United States, in 1856, stated the Department's policy as follows: "The government of the United States is not bound to interfere to secure the fulfillment of contracts made between their citizens and foreign governments, it being presumed that before entering into such contracts the disposition and ability of the foreign power to perform its obligations was examined, and the risk of failure taken into consideration."

Diplomatic intervention may undoubtedly be resorted to if one of the following situations is present: (1) where, as mentioned above, there is a denial of justice, a lack of facilities for securing justice, or an undue delay in its administration;[3] (2) where there has been an arbitrary cancellation of a contract (frequently the case with concessions) without recourse to a determination by a judicial body regarding the legitimacy of the act (this being in the nature of a taking "without due process of law")[4]—in such case the Calvo clause in the concession or other contract depriving the alien of his right of appeal to diplomatic aid, has been held by the claimant's government to be no bar;[5] (3) where there have been other arbitrary acts, such as might reduce the value of contracts, presenting a situation similar to the immediately preceding one;[6] (4) when the governmental breach of contract involves a tort—here the claimant's government will be much more ready to assist him;[7] (5) some claims are considered especially equitable and are consequently more urgently pressed;[8] (6) when an arrangement for the liquidation of a claim has already been made, it will generally be enforced through diplomatic pressure.[9]

Despite their reluctance to press contract and concession claims diplomatically, governments have always been ready to present such claims to boards of arbitration.[10] "Practically

3 Moore's Arbi. 3517; 6 Moore's Dig. 724; Borchard D. P. C. A. 291.

4 6 Moore's Dig. 287; Borchard D. P. C. A. 292.

5 Ralston 819, 322; Moore's Arbi. 1643; See also, Internl. Law Assn. 24th Report, 1908, and 6 Moore's Dig. 725.

6 6 Moore's Dig. 729, 724; Moore's Arbi. 3567-8, 3465, 4939.

7 For. Rel. 1898, 274-91, 6 A. J. I. L. (1912), 396, 407.

8 Wharton's Dig. II, 658; 6 Moore's Dig. 714-15.

9 6 Moore's Dig. 719, 720-21, 711-12.

10 Borchard, Sec. 115.

all international commissions, where the terms of submission in the protocol could be construed as sufficiently broad, have exercised jurisdiction over contract claims, for example, the United States-Spanish Commission of February 22, 1819, the three Mexican commissions of April 11, 1839, of March 3, 1849 (domestic), and of July 4, 1868, the United States-British Commission of February 8, 1853, and August 18, 1910, the United States-Peruvian Commission of January 12, 1863, the United States-French Commission of January 15, 1880, the United States-Venezuelan Commission of December 5, 1885, and the Venezuelan Commissions of 1903 sitting at Caracas, and many others. A conflict arose in the commission of July 4, 1868, due to the difficulty of reconciling vacillating opinions with proper judicial action. Commissioners Wadsworth, Palacio and Umpire Lieber (though the latter was not always consistent) had allowed claims on contracts concluded between citizens of the United States and agents of Mexico for the furnishing of arms, munitions, and other material to the Mexican Government, on the ground that the failure to pay for such goods constituted an 'injury' to the 'property' of an American citizen under the terms of the protocol. The Mexican commissioner, Palacio, while adhering to the view of his colleagues that contract claims were within the jurisdiction of the commission, believed that a demand and refusal of payment was a condition precedent to the allowance of the claim. Subsequently, upon the death of Dr. Lieber and the resignation of Commissioner Palacio, Sir Edward Thornton became umpire and Señor Zamacona the Mexican commissioner. Thereupon a different view was taken as to the jurisdiction of the commission over contract claims. Sir Edward Thornton considered that he ought to follow the practice of the Executive of exercising discretion in assuming jurisdiction of contract claims, for which reason, while admitting the jurisdiction of the commission over contract claims, he declined to allow such as were based upon voluntary contract, in the absence of clear proof of the contract and proof that gross injustice had been done by the defendant government. The decisions of the commission,

therefore, are at times contradictory, claims of exactly the same nature having been allowed by Wadsworth, Palacio and Lieber, and rejected when Zamacona became the Mexican commissioner and Thornton the umpire."[11]

3.

Bonds of the Mexican Government or Bonds Guaranteed By It.

The peculiar nature of government securities and the limited rights of the holders of such securities are well known, and must be supposed to have been taken into consideration by purchasers of and traders in such securities. This explains in great measure the reason for the general international view that such claims should be presented with great reluctance.

Some publicists hold that bond contract claims are in the same class as ordinary contract claims, and should be treated similarly.[12] Offsetting these we have the followers of the doctrine so ably supported by Dr. Luis Drago, former Minister of Foreign Affairs of Argentine,[13] that armed foreign intervention for collecting public debt should be a breach of international law. Many have misunderstood the true Drago doctrine, and believed it to have been a protest against any kind of intervention, even peaceable and diplomatic. The United States has taken the attitude as expressed in the Porter doctrine, presented by General Horace Porter at The Hague Conference,[14] that the use of force for the collection of public debts, should not be permissible until arbitration had settled the justice of the amount of the debt as well as the time and manner of payment. Drago has not tried to preclude diplomatic interposition for the collection of public debts. The question has been presented to arbitral tribunals

11 Borchard D. P. C. A. 299.

12 Vattel, Book 2, Chap. 14, Secs. 214-216; Phillimore, 3d ed. Book 2, Chap. 3, 8, et seq.; Hall, 6th ed., 276; and Moore's Arbi. 3650.

13 For. Rel. 1903 1-5; see also article of Amos S. Hershey, "The Calvo And Drago Doctrines" in 1 A. J. I. L. 24-45.

14 Reported in Scott's Hague Peace Conference II (Doc.) 357, 361.

in several instances,[15] without very satisfactory results in the way of establishing clear precedents. Arbitration is surely the preferable way of settling international disputes arising out of public indebtedness. Neither the claimant nor the defaulting state can have much objection to the discussion and determination of such claims by a neutralized and unbiased arbitral body.

A situation slightly different from one of ordinary public indebtedness under bond issues, is presented by bonds of private corporations which have been guaranteed by the Mexican Government. It is submitted that Mexico cannot withdraw from its obligation as underwriter or insurer of such bonds and that upon her default on such an obligation, a foreign government may rightfully seek diplomatic aid to press the claims of its citizens holding such bonds.

One of the greatest problems which confront Mexico and which must be satisfactorily solved before foreign capital can again feel safe in investing in Mexican enterprises is the settlement of claims based on losses occasioned by the default of the Government in its capacity as guarantor of private and public service and railroad bonds. As stated above, the obligation of the Government is clear, but the losses sustained are so large that it is probable that some arrangement will have to be made whereby the Government would be discharged of its international liability upon partial payment or will be given time within which to pay. Whether such arrangements will be made under a Mixed Claims Commission or under an agreement between the Mexican Government and a committee of bankers or bondholders remains to be seen. Unquestionably, the latter is preferable and should be urged by all parties concerned, as such agreement will permit of a general consideration of the rehabilitation of the properties. This would be of great advantage, and would probably insure to the Republic much needed transportation facilities and to the bondholders a profitable and good future investment of capital. The situation should not and cannot satisfactorily be viewed from the single viewpoint of adjudi-

15 Borchard D. P. C. A., Sec. 124.

cation and payment, but must rather be viewed in a broader way, looking to reconstruction, rehabilitation and the development of facilities upon which the whole economic future of the Republic depends. Mexico's ability to pay her just obligations is primarily conditioned on her economic and financial future, which, in turn, is unquestionably dependent on transportation facilities. Transportation is the determining factor in the development of Mexico, and the settlement of claims respecting railroads and bonds must be made in the light of national development, otherwise the entire financial and economic structure will collapse and the collection and payment of even adjudicated claims will be found impossible.

C.

ACTS OF AUTHORITIES.

Broadly speaking, the liability of Mexico for acts of its "authorities" is determined by the ordinarily accepted rules of private law respecting agency. So, clearly, she is responsible for the acts of her officials within the scope of their authority.[1] It is equally clear that she is not responsible for the acts of officials outside of their apparent authority.

"The general rule of international law observed by the United States is that sovereigns are not liable in diplomatic procedure for damages occasioned by the misconduct of petty officials and agents acting out of the range not only of their real but of their apparent authority."[2]

"The responsibility for acts of its functionaries, be these administrative or judicial, rests upon a personal basis, rather than a material one, as in the case of responsibility for acts of private individuals. The relation to the individual concerned rather than the act itself makes the state responsible. Another distinction of importance is the question of responsibility for acts done within and without the scope of an officer's agency. Acts within the scope of an officer's agency, if in contravention to the principles of international law, will be regarded as acts for which the government is responsible. An exception should be made, however, in cases of military commanders when responsibility will be primarily a matter of circumstance, depending on the nature of the acts. The enactment of statutes by which a state denies responsibility for acts of its agents, are without international sanction and are an unjustifiable attempt on the part of the state to extricate itself from its international obligations. As regards acts without the scope of an officer's agency, these can no more give rise to an international obligation than can a burglary or hold-up. Municipal law should provide means of recovery against such individuals. International compli-

1 6 Moore's Dig. 999.

2 Mr. Adee, Act. Sec. of State, to Baron de Fava, Italian ambass., No. 602, August 14, 1900, MS. Notes to Italian Leg. IX, 451, 453.

cations arise where such legislation is lacking, and not from the acts themselves."[3]

Outrageous oppressions and cruelties by government officials have often been made the subject of diplomatic representations.[4]

Judicial bodies or justices are not considered agents of the government in the sense that the government is liable for their judicial acts,[5] and Mexico would not ordinarily be liable for the wrongful acts of its lower and inferior courts.[6] This is principally on the theory discussed in Chapter II, Part B, Section 2, that the individual should exhaust his local remedies before asking diplomatic interposition.

In the case of the claim of Jonan v. Mexico, of July 4, 1868,[7] the failure of the Mexican Government to prevent an illegal assumption of jurisdiction by a court, on remonstrance, was held by the United States Government to place upon the Mexican Government the responsibility for injuries resulting. In the case of Colesworth and Powell, British citizens,[8] the Colombian Government condoned or approved the illegal act of a judge, and the British Government held the Colombian Government to responsibility on the ground that the British citizens had no redress other than through diplomatic channels. The United States interposed against Great Britain in the case of the Barque Jones, February 8, 1853,[9] when the British Government refused to investigate an unjust judgment but sustained it after remonstrance.[10]

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3 Julius Goebel, Jr. "International Responsibility of States" VIII Amer. Jour. Int. Law, p. 816.

4 Case of Wheelock, brought in Venezuela, 6 Moore's Dig. 744; Case of Wilson, shot at Bluefields, For. Rel. (1894) 468; For. Rel. (1894), 470, 475, 477; 6 Moore's Dig. 746; Case of Geo. Webber, subjected to cruelties in Turkey, 6 Moore's Dig. 746; Case of Dr. Shipley, For. Rel. (1903) 733; 6 Moore's Dig. 747; Case of a Mexican, Zambrona, shot by a U. S. Ranger, For. Rel. (1904), 473-482; 6 Moore's Dig. 747; and many others.

5 See 6 Moore's Dig. Sec. 1002.

6 Borchard "Diplomatic Protection of Citizens Abroad," Sections 81 and 128.

7 Moore's "International Arbitrations Digest," page 3251.

8 Moore's Arbitrations, pages 2051, 2085.

9 Moore's Arbitrations, page 3051.

10 See also Holtzendorff Handbuch, II, 74, Fiore Dr. Int. Codifie, Sections 339, 340; Calvo I, Section 348; Pradier-Fodere I, Section 402; Bluntschli, Section 340, as cited in Borchard, page 199, Note 2.

"Where there were judicial proceedings, the Commissioners recognized the principle that a State is politically answerable only for the decisions of its highest tribunals, but when the course of decisions in the highest court was absolutely uniform, and a reversal of the condemnation was hopeless, the claimant was not required to show that he had prosecuted an appeal."[11]

In the absence of one of the factors above described, the alien must pursue the available legal remedies before the State can be held accountable by his home government.

A different situation is presented when the alien has taken his case to the highest local court and has there been denied justice.[12] Having tried without success to obtain justice in the highest court the alien has no other recourse than an appeal to the diplomatic arm of his own government for aid. He has the right then to avail himself of this last remedy, a remedy not shared by the national.

It is not true that Americans doing business abroad or participating as stockholders in a business abroad subject themselves to the local law to such an extent that they must suffer injustices alike with nationals. When the national has exhausted the local remedies he has no further recourse; but the alien who has appealed to the highest local court and has still clearly been denied justice has a further remedy,—the interposition of his home government.

Where there has been some flagrant denial of justice sanctioned by the court of last resort the State is liable for this wrongful act of its highest judiciary.[13] If the decision of this court is merely an erroneous and unjust interpretation of the law, without any unlawful taint or irregularity in procedure, the State will not be brought under liability. "Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered,

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11 Moore's Arbitrations, page 4472, discussing the opinion of Commissioner Kane on the French indemnity of 1831; see also ibid, page 4544. Final Report on the Van Ness Convention with Spain, February 17, 1834, to the same effect.

12. Borchard, p. 197.

13 Borchard, Section 81 and 128.

aliens have no cause for complaint in the absence of an actual denial of justice."[14]

It must appear clearly that there has been something unlawful or irregular about judicial proceedings before a government should intervene in behalf of a citizen claiming judicial injustice abroad.[15] The maladministration of justice, alone, will not suffice. Even an adjudication based on an evidently erroneous interpretation of the law will not do. There must be fraud, corruption, bribery, a denial of a fair opportunity to present a case, or some similar element, to bring the situation within the class of those warranting diplomatic interposition.

"It has already been observed that the state is not responsible for the mistakes or errors of its courts, especially when the decision has not been appealed to the court of last resort. Nor does a judgment involving a *bona fide* misinterpretation by the court of its municipal law entail, on principle, the international liability of the state. Only if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the state, or if the court has willfully and in bad faith, disregarded or misinterpreted its municipal law, does the state incur international liability.[16]

It has in several important cases been held that "a grossly unfair or notoriously unjust decision may be and has been considered as equivalent to a denial of justice."[17] In the case of Frederic Bronner *v.* Mexico, No. 115, decided under the Convention of July 4, 1868,[18] Umpire Thornton held that the judgment of the Mexican Court, which had approved a confiscation by Customs officials of imported goods, on the ground that the invoices showed fraud, was so unfair as to amount to a denial of justice. In his report, Thornton said: "The umpire is always most reluctant to interfere with the sentences of judicial courts, but in this instance, the decision

14 Borchard, page 198; see also page 197.
15 Borchard, page 197.
16 Borchard, Dip. Prot. Cit. Abroad, p. 332.
17 Borchard, Dip. Prot. Cit. Abroad, p. 340.
18 Moore's International Arbitrations, p. 3134.

seems to be so unfair as to amount to a denial of justice." In the case of Jacob Idler *v.* Venezuela, No. 2, under the Convention of December 5, 1885, between the United States and Venezuela, the Commission held that the judgment of the Superior Court should not be binding and awarded damages to Idler on contract claims which had been denied by the Venezuelan Courts. The decision was based on very much the some theory as the Bronner case.[19]

19 Moore's International Arbitrations, p. 3497.

D.

SANITARY MEASURES.

During the epidemic of diarrhea cholera in the Valley of Parahyba, State of Rio, Brazil, in 1894, traffic over the railroad from Rio de Janeiro to Sao Paulo was suspended and several lots of watermelons were seized and destroyed by the Sanitary Authorities of the State of Sao Paulo. Some of the producers of these melons were citizens of the United States and their claims for indemnity having been denied by the State of Sao Paulo, they appealed to their own Government for diplomatic aid. In August, 1896, the Department of State held that the measures taken by the Sanitary Authorities were justified by the circumstances and that no indemnity could be demanded by the Americans involved.[1]

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1 Mr. Adee, Act. Sec. of State to Mr. Thompson, Min. to Brazil, No. 350, August 21, 1896, MS. Inst. Brazil XVIII, 202; and see 6 Moore's Dig. 751.

E.

ACTS OF SOLDIERS.

Mexico is not liable for the unauthorized acts of its soldiers unless they were acting in the field or constructively under its authority in contravention of the rules of civilized warfare.[1]

"A tribunal of arbitration, sitting in Chile, adopted certain rules of decision, among which was the following:

> 'Acts committed by soldiers or persons connected with the army without orders from their superiors in command do not compromise a government.'

With reference to this rule the Department of State said:

> 'The position of this Government is, that while a government is responsible for the misconduct of its soldiers when in the field, or when acting either actually or constructively under its authority, even though such misconduct had been forbidden by it, it is not responsible for collateral misconduct of individual soldiers dictated by private malice. But the mere fact that soldiers, duly enlisted and uniformed as such, commit acts "without orders from their superiors in command," does not relieve their government from the liability for such acts.' "[2]

In the case of Owen Young, a United States citizen, who was shot and killed on September 24, 1884, by a Peruvian soldier, when the former protested at the acts of soldiers who had overrun his place after an engagement with the enemy, the United States demanded punishment of the criminal and reparation to the family of the deceased. Secretary of State Frelinghuysen based his claim as follows:—

"The mere fact that soldiers, duly enlisted as such, commit acts without orders from their superiors in command, does not exempt their Government from liability for such acts. A

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1 Pear's Case, For. Rel. (1900) 701-702, 6 Moore's Dig. 762.

2 Mr. Bayard, Sec. of State, to Mr. Buck, Min. to Peru, No. 33, Oct. 27, 1885, For. Rel. 1885, 625. The United States is not liable for injuries resulting from the unauthorized acts of individual soldiers. Mr. Magoon, law officer, division of insular affairs, Feb. 6, 1901, Magoon's reports, 328.

government may be responsible for the misconduct of its soldiers when in the field, or when acting, either actually or constructively under its authority, if such misconduct, even though it had been forbidden by it, was in contravention of the rules of civilized warfare."[3]

When Jose M. Delgado, an American citizen, was shot under the orders of the Spanish General Melguizo during the Cuban insurrection, despite the fact that Delgado had exhibited his United States citizenship papers, the American Secretary of State, Olney, demanded reparation.[4]

Again, when Bernard Campbell, a citizen of the United States, was beaten in April, 1899, by soldiers of the Haytian army, presumably for his refusal to serve in the Haytian navy, the United States demanded a substantial indemnity.[5]

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3 Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, min. to Peru, No. 81, Dec. 5, 1884, For. Rel. 1885, 587; Mr. Bayard, Sec. of State, to Mr. Buck, min. to Peru, No. 85, Aug. 24, 1886, MS. Inst. Peru, XVII, 231. For prior correspondence in relation to this case, see For. Rel. 1884, 432-436; For. Rel. 1885, 587-616.

4 Mr. Olney, Sec. of State, to Mr. Taylor, min. to Spain, May 11, 1896, For. Rel. 1896, 586-588.

5 Mr. Gresham, Sec. of State, to Mr. Smythe, min. to Hayti, Jan. 31, 1896, For. Rel. 1895, II, 811.

F.

ARREST AND IMPRISONMENT.

Probable cause is all that is necessary to justify arrest, and where proceedings are regular and the foreigner is really an offender or there is good cause to believe him such, no reparation may be asked for his arrest and none for his imprisonment if he is brought to an early trial and given the recognized rights of a person accused of crime. "With reference to the case of Dr. Peck, a citizen of the United States, while in Cuba for his health, who was, as it was alleged, arrested and thrown into prison without accusation of crime, the Department of State said: 'The United States ask no immunity for their own citizens when offenders, but they cannot quietly submit to see them arrested and thrown into prison and there detained without any charge against them.' "[6]

Where the arrest is palpably false or the detention irregular the claim for reparation may be instituted.[7]

Forcing accused and imprisoned aliens to labor pending trial is clearly a contravention of international law. "In remonstrating against the action of the Mexican authorities in the case of two American citizens, who, while imprisoned at Piedras Negras on a charge of crime, of which they were afterwards acquitted, were compelled to labor on the public highways until the court, on the protest of the American consul, relieved them, the Department of State said: 'The deprivation of liberty following upon a charge of crime is allowed, because, without it, the punishment of criminals would be impracticable, although in many cases the innocent may thus be made to suffer unjustly. The exaction of labor rests on a wholly different ground. It is essentially a penalty, just as the imposition of a pecuniary fine; and it is understood

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6 Mr. Marcy, Sec. of State, to Mr. Cueto, Span. min., unofficial, April 17, 1855, MS. Notes to Span. Leg. VII, 56.

7 Case of Frederick Nevs, in Hayti, MS. Inst. Hayti, III, 304, 305, 310. 6 Moore's Dig. Secs. 1011, 1012. The case of Van Bokkelen in Hayti, Moore's Int. Arbitra. II, 1807-1853, 6 Moore's Dig. 772, is an example of the violation of treaty rights in this case by irregular imprisonment.

that this distinction is clearly laid down in the Mexican law.' "[8]

"Detention of witnesses, * * * not unduly prolonged or harshly enforced, * * * is merely a temporary measure in the administration of justice."[9]

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8 Mr. Blaine, Sec. of State, to Mr. Dougherty, chargé, No. 423, Dec. 29, 1890, MS. Inst. Mexico XXII., 687.

9 Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Min. to Hayti, No. 324, Jan. 20, 1885, For. Rel. 1885, 490. 6 Moore's Dig. 773.

G.

CLAIMS BASED ON REVOLUTIONS AND INSURRECTIONS.

I.

IN GENERAL.

Claims such as would be founded upon damages sustained merely as the result of operations of war during the recent revolutions and insurrections in Mexico are not usually allowed. It is not true, however, that foreigners must always share the treatment accorded nationals. If the nationals are unjustly treated in the matter of presenting or adjudging claims, the foreign resident or property holder may rightly resort to diplomatic representations by his home government—he is not left to suffer injustice merely because the nationals are accorded injustice. It is true, however, that where there exists the established practice of denying a particular class of claims of nationals, and there is no internationally adjudged injustice connected with the practice, such claims by foreigners will be rightly denied. Where there is nothing unfair or unjust in the treatment accorded nationals, foreigners must share in the treatment. Most claims resulting from operations of war or revolution are ordinarily denied under the theory and practice as stated above.[1]

1 Mr. Cass, Sec. of State, to Mr. Burns, M. C., April 26, 1858, 48 MS. Dom. Let. 323. Mr. Seward, Sec. of State to Mr Mercier, French. min., Nov. 8, 1862, Dip. Cor. 1863, II, 742; same to same, Feb. 24, 1863, id. 752. Mr. Seward, Sec. of State, to Count Wydenbruck, Austrian min., Nov. 16, 1865, MS. Notes to Aust. Leg. VII., 193. Mr. Fish, Sec. of State, to Mr. Thornton, British min., May 16, 1873, MS. Notes to Gr. Brit. XVI., 101. Reaffirmed in same to same, Oct. 6, 1873, id. 235. Mr. Bayard, Sec. of State, to Mr. O'Connor, Oct. 29, 1885, 157 MS. Dom. Let. 483. Mr. Olney, Sec. of State, to Mr. Thompson, min. to Brazil, No. 315, Jan. 29, 1896, MS. Inst. Brazil, XVIII., 171; same to same, No. 358, Oct. 10, 1896, id. 210. Moore, Int. Arbitrations, IV., 3710, adopted in Bacigalupi v. Chile, United States and Chilean Claims Commission (1901), 151. See also, Wilson's Case, Spanish Claims Commission (1881), Moore, Int. Arbitrations, IV., 3674-3675. Mr. Magoon, law officer, division of insular affairs, War Dept., Feb. 6, 1901, Magoon's Repts. 338. Mr. Blaine, Sec. of State, to Mr. Langston, July 1, 1881, MS. Inst. Hayti, II., 275. Mr. Fish's report of May 15, 1871, giving the reports of Mr. Whiting, Solicitor of the War Department, on claims by aliens for damages in the civil war, is in Senate Ex. Doc. 2, 42 Cong. Special sess. Mr. Lawrence's report on war claims of aliens is found in House Rept. 262, 43 Cong. 1 sess.

Calvo[2] denies absolutely the responsibility of governments to indemnify aliens for losses sustained during revolutions as being "a deep injury to one of the constituent elements of the independence of nations—that of the territorial jurisdiction."

Pradier-Fodéré[3] points out the inconsistency of the position of the European states (and with them in this matter may be classed the United States) in formally asserting the principles of responsibility for losses occasioned through revolution when the defendant government is one of the Republics of South America, and denying as firmly the same principles when they are themselves defendants. Whenever a European state does pay an indemnity for this variety of loss, says Pradier-Fodéré, the payment is made with a declaration that it is "an act of spontaneous liberality," not binding as a precedent. In supporting Calvo this author says as follows:

"To sum up, the generally admitted rule, according to which in principle states need not indemnify foreigners for losses suffered during a civil war, rests on the following very serious conditions: Foreigners who settle in a country to carry on their business submit themselves by that act to the same laws and to the same tribunals as citizens of the country, and the government cannot be held responsible towards them for the consequences of an outbreak or of a civil war, without making such responsibility an unjustifiable inequality between foreigners and nationals. Every sovereign state has the right indeed to compel respect for the order established in its territory, even by the employment of arms, and it does not rest, in respect of damages which result from resorting to force, under obligations more extensive as to foreigners than as to its own nationals. To demand this would be to do injury to the territorial jurisdiction of a sovereign state; it would introduce into international relations a privilege favorable to strong states, injurious to weak states."

But Pradier-Fodéré does limit the application of Calvo's doctrine "to states which are capable of fulfilling their inter-

2 Droit Int. III., Sec. 1280.

3 Traite de Droit Int. Pub. I., 343, Sec. 205, citing Calvo; also Funck-Bentano and Albert Sorel Precis de Droit des Gens, 1877.

national obligations," and with such as are not, he claims diplomatic interposition is justifiable.

Fiore[4] asserts that foreigners cannot demand indemnity for injuries resulting from "force majeure" or from the governmental acts necessary to the suppression of a revolution or insurrection, but that the government subjects itself to liability if it does not do everything necessary to protect the property and goods of foreigners or if it does not endeavor to repress the violence and offenses of its citizens.

Hall[5] seems to lean strongly to Calvo's doctrine, saying: "The highest interests of the state are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state."

Pillet[6] states the rule substantially in agreement with Fiore.

The following resolution on the responsibility of states for damages suffered by foreigners during riots, insurrections or civil war, was adopted by the Institute of International Law at the session of Sept. 10, 1900,[7] and clearly presents a sound view of this branch of international law:

> "1. Independently of cases where indemnity may be due to foreigners in virtue of the general laws of the country, foreigners have a right to indemnity when they are injured in their person or property in the course of a riot, an insurrection, or a civil war; (a) when the act through which they have suffered is directed against foreigners as such, in general, or against them as subject to the jurisdiction of any given state; or (b) when the act from which they have suffered consists in the closing of a port without previous notification at a seasonable time, or the retention of foreign vessels in a port; or (c) when the damage results from an act contrary to law committed by an agent of the authority; or (d) when the obligation to make indemnity is established, in virtue of the general principles of the laws of war.

4 Droit Int. Pub. Paris 1885, C. Antoine's Translation I, Sec. 675.
5 Int. Law 5th ed. 222-223; Bluntschli, Sec. 380; Calvo, Secs. 292-295.
6 Les Lois actuelles de la Guerre (Paris 1901) 29.
7 Annuaire de l'Institut de Droit Int. XVIII, 253-256.

"2. The obligation is likewise established when the damage has been committed (No. 1 (a) and (d)) on the territory of an insurrectionary government, either by said government or by one of its functionaries. Nevertheless, demands for indemnity may in certain cases be set aside when they are based on acts which have occurred after the state to which the injured party belongs has recognized the insurrectionary government as a belligerent power, and when the injured party has continued to maintain his domicile or habitation in the territory of the insurrectionary government. So long as this latter is considered by the government of the injured party as a belligerent power, claims contemplated in line 1 of Article 2 may be addressed only to the insurrectionary government, not to the legitimate government.

"3. The obligation to make indemnity ceases when the injured parties are themselves the cause of the events which have occasioned the injury. There is especially no obligation to indemnify those who have entered the country in contravention of a decree of expulsion, or those who go into a country or seek to engage in trade or commerce, knowing, or who should have known that disturbances have broken forth therein, any more than those who establish themselves or sojourn in a land offering no security by reason of the presence of savage tribes therein, unless the government of said country has given the immigrants assurances of a special character.

"4. The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations.

"5. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of a denial of justice, or of evident violation of justice or of *jus gentium*.

"Recommendations.

"The Institute of International Law recommends that states refrain from inserting in treaties clauses of reciprocal irresponsibility. It thinks that such clauses are wrong in excusing states from the performance of their

duty to protect their nationals abroad and their duty to protect foreigners within their own territory.

"It thinks that states which, by reason of extraordinary circumstances, do not feel able to insure in a sufficiently effective manner the protection of foreigners on their territory, can escape the consequences of such a state of things only by temporarily denying to foreigners access to their territory * * * .

"Recourse to international commissions of inquiry and international tribunals is, in general, recommended for all differences which may arise because of damages suffered by foreigners in the course of a riot, an insurrection, or a civil war."

Mr. Julius Goebel, Jr., in his admirable article in 8 Am. Jour. Int. Law, p. 802, on "International Responsibilities of States," maintains that the international point of view on this question represented by such publicists as Calvo, Pradier-Fodéré and Hall, is based on an erroneous application of private law principles to international law and a confusion of the fundamental principles of diplomatic interposition and the rights of states. He grants that the state is not responsible for all the losses sustained as a result of revolution, but maintains that the burden should be on the state to excuse itself from liability, whereas the theorists above mentioned place the risk of injury on the foreign resident and the burden upon him.

Mr. Goebel at p. 841 comments on the attitude toward this question once aired by Mexicans:

"Like other Latin-American countries, Mexico since her independence had been prey to continuous insurrection during which considerable losses had been sustained by foreigners, more particularly by French subjects. The basis of the relations between France and Mexico was a provisional treaty which had never been signed by Mexico, and for this reason no attention was paid to French demands. France finally made a peremptory demand for an indemnity of 600,000 francs,[8] but this was refused, and accordingly diplomatic relations were severed and Mexican ports declared to be under

[8] 27 Br. & For. St. Pap., p. 1178; H. Bancroft Works, Vol. 13, p. 187.

blockade. This procedure did not bring Mexico to terms. Reinforcements were sent and, following an unsuccessful conference, Vera Cruz was bombarded and abandoned by the inhabitants. At this point Great Britain offered to mediate, and the two contendents agreeing, a new conference was held. France did not, however, follow up her advantage but accepted practically the same conditions which had been previously offered her by the Mexican Government.[9]

"During the course of the dispute, an interesting doctrine was aired by the Mexicans. They declared that:[10] 'We are a nation always agitated by revolutions; as such we suffer all the consequences of a state of revolution, popular tumult, robberies, plunderings, assassinations, unjust decrees, and since we are obliged to suffer all these evils, we consider that the foreigners who may be in our country must suffer like ourselves, without a chance of redress or compensation.' However anarchistic this confession of faith may appear, it is not an isolated expression of opinion. It stands as the most candid and concise statement of the principle which the Latin-American states are forever reiterating."

The importance of the general principle, that claims resulting from operations of war and revolution and insurrection are not recoverable, cannot be overestimated in its application to the present Mexican situation. A very considerable number of the alleged existing claims against Mexico, which have arisen since 1910, fall within the operation of this principle, and its fair and impartial application will probably invalidate the claims of many foreigners who were occasioned real suffering but who are measuring their expected recoveries not on established principles of law but on their hopes for indemnity. A full and clear appreciation of the meaning and effect of this principle would eliminate one of the chief elements of international friction in the Mexican claims situation. An elimination of claims, which not only do not present a *prima facie* case but are ruled out by as fundamental a principle as the one above discussed, would help very decidedly

9 27 Br. & For. St. Pap., p. 1186 ff.
10 Ibid., p. 1176.

to clarify the claims situation and to focus attention upon those claims which really are based upon sound principles of international law.

2.

Martial Law.

In the institution of Martial Law, international law finds nothing reprehensible. Each nation is left to declare a state of martial law at its own discretion, and the fact that an alien has been subjected to treatment under such law, more severe than would have been his treatment under the civil law, will not *per se* be a valid basis for diplomatic interposition by his home government.[1] Mr. Seward, the U. S. Secretary of State, in a letter to Mr. Edwards,[2] said that it had been the experience of the United States that the detention of neutrals on suspicion which "investigation found insufficient to warrant the continuance of such restraint" was one of the unavoidable incidents of civil war.

If there is "probable cause" for an arrest and detention under martial law no claim may be made. In the case of Manuel Gil dos Reis, a Portuguese subject imprisoned in Hawaii under martial law, the United States Secretary of State declared that there was "probable cause" and that the arrest under martial law as such could not be a basis for an international claim.[3] But if the act under martial law is vindictive or without "probable cause" a claim will be pressed by the Government of the offended alien. In the case of the Panama "Star & Herald," a newspaper owned and edited by Americans, which was repressed under martial law in Panama in 1886, the United States insisted on reparation to the owners on the ground that the order of General Santo Domingo Vilar, suppressing the paper, was a vindictive, un-

1 See case of British subjects in Memphis, U. S. in July, 1864. Parl. Papers No. 363, 1864 or 1 Hallecks' Int. Law (Baker's Ed.) 351.

2 80 MS. Dom. Let. 369.

3 Mr. Hill, Act. Sec. State, to Viscount de Santo Thyrso, Port. Min. Feb. 15, 1901, MS. Notes to Port. Leg. VII., 280.

authorized act by a military authority using his power for a vicious purpose and making his government responsible.[4]

It is probable that claims will be made against the Mexican Government for losses sustained incidental to a detention or imprisonment under martial law. Such claims will be invalid unless the losses were occasioned by thefts and pilferings of the authorities who enforced the martial law. The Mixed Claims Commission organized under the Spanish-United States Agreement of 1871 awarded damages to an American engineer, part of whose effects had been stolen by Spanish soldiers while he was imprisoned under Spanish martial law in Cuba.[5]

3.

Compensation for Property Taken or Destroyed for Belligerent Purposes.

When property is taken for the purposes of belligerency a situation arises similar to that of the exercise of "eminent domain" and adequate compensation must be made. The following is a good statement of the rule and its logic:

"Every civilized state recognizes its obligation to make compensation for private property taken under pressure of state necessity, and for the public good. The state is the transcendental proprietary of all the property, real and personal, of its citizens or subjects. This transcendental right—the *eminent domain* of the state in all countries where rights are regulated by law—is so exercised as to work no wrong, to inflict no private injury, without giving to the party aggrieved ample redress. This doctrine was not engrafted on the public law to give license to despotic and arbitrary sovereigns. It has its foundation in the organization of societies and states, and is as essential to a republic as to the most absolute despotism. It is of the very essence of sovereignty, and without it a state could not perform its first and highest duty, its own preservation. Vital as is this high prerogative

4 6 Moore's Dig. 775, 782.

5 Moore's Int. Arbitration IV, 3268. See also S. Ex. Doc. 108, 41 Cong. 2 Sess. 203, 204.

of states, it must be exercised in subordination to the clear principles of justice and right. Whenever, from necessity or policy, a state appropriates to public use the private property of an individual, it is *obliged,* by a law as imperative as that in virtue of which it makes the appropriation, to give to the party aggrieved redress commensurate with the injury he has sustained. Upon any other principle the social compact would work mischief and wrong. The state would have the right to impoverish the citizen it was established to protect; to trample on those rights of property, security for which was one of the great objects of its creation. * * *

"'Is the state bound to indemnify individuals for the damages they have sustained in war? We may learn from Grotius that authors are divided on this question. The damages under consideration are to be distinguished into two kinds—those done by the state itself or the sovereign, and those done by the enemy. Of the first kind some are done deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a tower, a rampart, or any other piece of fortification; or where his standing corn or storehouses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the individual, who should bear only his quota of the loss.' (Vattel, 403.) * * *

"The authorities cited (Vattel and Grotius) are direct and emphatic, and are supported by every writer of respectability upon public and national law."[6]

The United States Government insisted on the indemnification of some of its citizens who were forced by the Spanish authorities in Cuba to build defenses and to contribute large sums for other military constructions.[7]

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6 Grant's Case, 1 Ct. Cl. 41, 43-44, citing Mitchell v. Harmony, 13 How., 113. See also, United States v. Russell, 13 Wall, 623. See Magoon's Reports 338, 615.

7 Mr. Fish, Sec. of State, to Mr. Mantilla, Spanish min., Jan. 11, 1876, MS. Notes to Span. Leg. IX., 414. See also supra, Sec. 540, IV., 20-21. The exactions here referred to were incidents of the Ten Years' War in Cuba, 1868-1878. The statement that they could not be justified "in time of peace" referred to Spain's contention that war in the international sense did not exist. See, in connection with the foregoing note of Mr. Fish to Mr. Mantilla, the instruction of Mr. Fish to Mr. Cushing, May 22, 1876, supra, Sec. 183, Vol. 2, p. 65.

There has been some reluctance to compensate for the destruction of property for belligerent purposes. The North German Confederation, of which Count Bismarck was Chancellor, indemnified the British owners of six colliers which were sunk in the River Seine by Prussian troops during the war of 1870.[8] It is doubtful, however, whether any other similar claims were paid.[9]

Samuel B. Crandall, in his article on the "Law Applied by Spanish Treaty Claims Commission,"[10] says of the work of that commission:

"In order to recover for the burning of property by the Spanish authorities it was necessary, under the ruling of the Commission, to show either that the burning was wanton and unnecessary, or that it was not a legitimate war measure. In no case was a claimant successful in recovering for the burning of cane by Spanish authorities, and in only a few cases were awards made for the burning of buildings by the Spanish authorities. (Casanova, No. 33.) The evidence before the Commission in the various cases showed that a large part of the burning of buildings chargeable to the Spanish authorities was for the effective enforcement of the concentration of the rural population in fortified centers, which was recognized as a legitimate war measure. If, however, the Spanish authorities appropriated or made use of the claimant's property, relief was granted. Awards were made in many cases for the appropriation of cane tops for forage, the use of buildings as quarters for the troops or for reconcentrados or for other purposes. In the Constancia, No. 196, an award was made for the use of claimant's private railway by the Spanish troops. The largest and most numerous awards were made for the appropriation of cattle by the troops. (Reyes, No. 153; Del Valle, No. 222; Del Valle, No. 278; Iznaga, No. 279; Iznaga, No. 111.) Of the principle of liability for the appropriation of private property as distin-

8 61 Brit. & For. St. Pap. 575, 7, 8, 611.

9 Mr. Everett, chargé at Berlin, to Frelinghuysen, Sec. of State, No. 309, April 3, 1882, Ms. Desp. from Germany, in reply to Department's No. 304, March 21, 1882.

10 IV., A. J. I. L., p. 820.

guished from the principle of liability for its destruction the Commission in its final report says:

> 'Awards were * * * made for appropriations of property by the Spanish authorities in cases where the property was *used* by such authorities, regardless of the purpose of the appropriations. In other words, a different rule was applied in cases where property was *destroyed* to prevent its falling into the hands of the enemy from that applied where property, for like purpose, was seized and *used* by the Spanish authorities. In the one case, ordinarily the state, under international law, incurs no liability, while in the other, the owner of the property, in the class of cases passed upon by the Commission, is, in the opinion of the Commission, entitled to compensation for the property so appropriated and used.
>
> 'In these cases (cattle cases) the Spanish officials, operating from their permanent garrisons, made the appropriations systematically from time to time, taking live stock for the sustenance of the garrisons and for shipment to the larger cities in the island. These appropriations for shipments were undoubtedly made for the double purpose of furnishing supplies to the Spanish soldiers stationed at the points to which the cattle were consigned, and at the same time to prevent their appropriation by the insurgents.'

"Under Number 10, of the governing principles announced by the Commission in April, 1903, and given above—that the stipulation in Article VII of the treaty between the United States and Spain of 1795, that the subjects and citizens of each nation, their vessels or effects, should not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever, embraced property on land as well as vessels and their cargoes—awards were made in the cases of Hernsheim, No. 297; Bauriedel, No. 239, and Gato, No. 171, for the detention of tobacco in Havana under a decree of the Governor and Captain-General of May 16, 1896, prohibiting the exportation of leaf tobacco from the Provinces of Havana and Pinar del Rio."

A Commission sitting on claims against Mexico might well be guided by the experiences and decisions of the Spanish Treaty Claims Commission on this subject.

4.

Claims Resulting from Seizures of the Revolutionist's Resources.

War supplies found in territory under the control of an insurgent or revolutionist army may legally be confiscated by the Federal Government. Cotton was such a "war supply" during the civil war in the United States. After the war or revolution is over claims for confiscations of this nature may be presented and will be granted when it appears that the claimant has furnished no voluntary aid to the enemy or insurgent government.[11]

5.

Forced Loans, Monetary Decrees, Bank Liquidations and Revolutionary Finance in General.

Revolutionary finance in Mexico since the overthrow of Diaz presents an interesting if tragic story. Many and large claims may be expected from losses of the kinds described in this section. No attempt can here be made to study in great detail the operations employed by the successive revolutionary bodies and governments to finance themselves and their, at times, desperate efforts to keep their heads above water. Nor will it be possible to discuss the exact extent to which there has become merged in the liability of the Federal Government the obligation to reimburse individuals and organizations for the various types of losses sustained by reason of the, usually dictatorial and confiscatory, financial operations hereafter described. It will be possible only in merest outline to note these losses and what liability for them there may exist.

Revolutionary finance may be grouped under three heads,—forced loans, levies and confiscations in occupied territory; forced acceptance of fiat or depreciated currency; and forced liquidations of banks.

11 Young v. United States, 97 U. S. 39. See also, the case of Maza & Larache reported in 6 Moore's Dig. 895.

Before its ultimate success each revolutionary movement was characterized, in its financial operations, by very much the same procedure. The revolution of Francisco I. Madero left in its wake, in the captured territory, banks wholly or partly ruined. These banks had been subjected to heavy levies, with the proceeds of which Madero and his leaders had paid their troops and financed the revolution. At the time Madero was overthrown, his Congress was considering means of reimbursing the despoiled banks, but the next revolution interrupted any plans that may have been begun and, since then, no attempt has been made to satisfy the Federal liability to these injured banks. Injustices similar to the Madero confiscations were done under each of the successive revolutionary movements after his overthrow. Huerta's confiscations were possibly not as great, or as obvious, as those of Madero, but to him are attributable numerous interferences with the monetary system which must have done great injury to foreigners. It should also be noted that Huerta attempted to finance himself by means of a foreign loan, whereas the other governmental heads attempted to do so by forced loans, increased taxation, and, in some cases, by illegal seizure and appropriation.

To Carranza and to those who at times aided him in revolution—Villa, Zapata, Urbina and others—may be attributed the largest part of the monetary confiscations for which the Government must now find itself liable. Wherever Carranza or his agents overran territory, heavy levies were put upon the banks. In some cases, as for example, in Torreon, all the cash and bank notes held by the banks were seized.

Some of these levies were frank confiscations, while others were so-called "loans." In either case the Government liability is clear. Confiscations will obviously form a basis for international claim. The rules in regard to forced loans are also quite clear. Secretaries of State Fish and Cadwalader in 1873-74, when considering the case of loans forced from Ulrich and Langstroth, claimed that Articles 8 and 14 of the United States-Mexican Treaty of 1831 had the effect of rendering the Mexican Government liable for the repayment of

forced loans.[1] But Mr. Evarts, while Secretary of State, in 1877, held that this same treaty did not really exempt United States citizens from such forced loans.[2] Aside from treaty provisions, it is certainly better international practice that foreigners should be exempted from forced loans.[3]

Loans once forced from foreigners by a government must be repaid by that government. Mr. Cadwalader when Acting Secretary of State, in an instruction to Mr. Foster, Minister to Mexico,[4] applied this rule to loans forced by insurgents as well as Federal authorities: "It may be conceded that by the public law foreigners in a country in a state of insurrection cannot expect to be indemnified for all losses sustained from insurgents when the regular government shall have been restored. The case of a forced loan, however, is believed to be an exception. The meaning of the word loan is, that the money borrowed is to be returned. If the borrower is a sovereign, his obligation to repay the amount is as sacred as that of a private individual. If he is an insurgent, who for the time usurps the regular authority, the latter may justly be expected to make it good if the loan was an involuntary one."

Let us proceed to the second group of revolutionary financial operations—the forcing of acceptance of depreciated or fiat currency. Not many of the hysterical and unsound methods of bolstering up failing finances and depreciating currency were overlooked by the revolutionary leaders of Mexico. Faced with extraordinary expenses in the conduct of Government by reason of the large armed forces continually in the field, with the revenue machinery of the Diaz regime sadly paralyzed and with foreign credit suspicious and unready, these leaders were often forced by circumstances to adopt unsound monetary policies which sometimes temporarily ameliorated financial conditions but generally failed

1 See No. 21, Mans. Inst. Mexico XIX., 18, No. 54 id. 48 and No. 141 id. 121.

2 No. 4, 85 Mns. Desp. to Consuls 519, No. 3991, Mns. Inst. Mexico XIX., 349, No. 511 id. 448, No. 542, id 478. See also, No. 568, For. Rel. 1879, 772.

3 See Mr. Bayard, Secretary of State to Mr. Buck, Minister to Peru, No. 65, May 20, 1886, Mns. Inst. Peru, XVII, 215.

4 No. 141, September 21, 1874, Mns. Inst. Mex. XIX, 121.

from their inception to do other than aggravate the evils sought to be cured. A detailed review of the monetary regulations which were put into operation by the successive governments since Diaz, and the effects of these regulations, would take a volume in itself. There are many such decrees and regulations and each should be separately considered in determining the validity of claims by foreigners presented for losses occasioned under them.

The rule cannot be denied that, regardless of the degree of liability to which the Government of Mexico may be held accountable by its own citizens, it may be held liable for losses to foreigners occasioned by such of these decrees and regulations as plainly interfere with the obligation of contract. Flagrant and notorious examples of such an interference with the obligation of contract may be found in the history of the Banco Nacional de Mexico and the Banco de Londres y Mexico. At this point, it is well to remember that, under the doctrine of the "El Triunfo" case (discussed in Chapter II, Part B, Section 1), claims by foreign stockholders in Mexican banks should receive diplomatic aid, and are not precluded because the claimants are stockholders in a national corporation.

The issues of fiat currency are particularly interesting. With the advent of Carranzista fiat paper currency began the most depressing period of finance in the revolutionary years. Early in 1913 Carranza had issued his first paper money, called the "Monclova." The public was forced under extreme penalties, and with the aid of troops, to accept in liquidation of debts and as full legal tender this fiat money.

Shortly after the arrival of the Constitutionalist Army at Tampico, there appeared the "Ejercito Constitucionalista" issue of paper currency, and when Carranza triumphantly entered Mexico City he brought this currency with him. Worse than this, he established his printing presses in Mexico City and a continuous stream of the new paper flowed from these presses. Gresham's Law immediately came into operation. Metal currency, even the smaller coins, and bank notes, disappeared, and the worthless paper money was

everywhere. The soldier forced the money on the shopkeeper, the shopkeeper paid the wholesaler with the same money, the wholesaler took it to the banks and the banks turned it back to the people.

When Villa dispossessed Carranza for a short time in Mexico City, the capital was during that period flooded with Villa issues (dos caras sábanas), while Carranza at Vera Cruz kept his presses busily at work turning out millions of "Vera-Cruzanas," with which he deluged the capital upon his re-entry. The Villa money was declared void and those who were unfortunate enough to be caught with quantities of it suffered loss.

It is of some importance to point out that the mortgage banks in Mexico, in particular, were subjected to great losses through being forced to accept depreciated or fiat currency. These banks had loaned large sums on mortgage, to be repaid, under the terms of the mortgages, in gold. The losses occasioned the mortgage banks when the Government decreed that all mortgage loans, despite the fact that the mortgagors had contracted to repay in gold, might legally be repaid in paper, were consequently enormous. This seems to be a very clear interference with the obligation of contract. Certainly when foreign banks were involved in these losses, claims arose in their favor on the ground that the Government had interfered with their fundamental contract rights.

There were some two hundred issues, large and small, of fiat paper currency during the revolutionary period, the total value probably considerably exceeding one billion pesos. All of these issues took about the same course. Forced on the public and having nothing behind them, they depreciated so rapidly that Carranza finally found himself forced to turn to some other field of finance more promising than the printing of worthless paper.

When the paper currency period came to an end and the country returned to a metallic currency, the banks held in their vaults the greater part of the coin and bullion in Mexico. Carranza, sorely in need of funds and no longer able to

pay his soldiers in depreciated or fiat paper, began a campaign against the banks which marked the last stage in the collapse of financial security in the Republic. The purpose of this campaign was ostensibly to rectify the unhappy financial situation, but was in reality ill-concealed confiscation of the metallic funds of the banks, often resulting in their complete destruction. The condition of the Mexican banks of issue whose reserves had been greatly depleted during the turmoil following the overthrow of Diaz, offered an opportunity to Carranza that he soon took advantage of. The old Banking Law of Mexico provided that banks of issue must keep their metallic reserve up to an amount equal to all their bills in circulation. All or most of these banks had been unable to maintain this reserve, whether by reason of governmental loans or assessments or whatnot, but were nevertheless solvent and fundamentally in sound financial condition. Under a short period of normal conditions, they would have been able to replenish their reserves and to comply with the old law, which they had been prevented from satisfying principally by reason of the national emergency. Carranza seeing in this situation the possibility of replenishing his treasury, under color of legal proceedings, on September 15, 1916, as First Chief of the Constitutionalist Army of the Republic of Mexico, issued a decree declaring the abrogation of all the banking laws of Mexico, of the General Law of Credit Institutions and of the laws authorizing concessions to banks of issue, and abrogating also the charters of all banks of issue organized or existing under the Mexican law. The decree then provided that all banks of issue be given sixty days within which to increase their metallic reserves to an amount equal to their bills in circulation. After the sixty-day period a Board of Sequestration was to be appointed by the Department of the Treasury, in the interests of the conservation of the banks only, which Board was to act as a commission to conserve the metallic specie of the banks where it had not been kept up to the required figure.

On December 14, 1916, Carranza issued another decree declaring all banks of issue, which had not brought their me-

tallic reserves up to the required standard within the sixty-day period, to be in a state of liquidation.

On April 4, 1917, Carranza created by decree the "Comision Monetaria," a commission to reorganize the circulation of fiduciary coin in Mexico.

By decree of April 6, 1917, Carranza ordered that the Comision Monetaria was to liquidate the banks of issue in accordance with the above-mentioned decrees.

It is important to observe that it was largely because of the control of the Department of Finance, through the Board of Sequestration and the Comision Monetaria, that most of the banks were unable to retire their bills in circulation and to build up their reserves. Furthermore, monies were continually withdrawn from the banks under various pretexts by the Boards and the Comision and large sums never repaid.

In most cases no liquidation proceedings were inaugurated beyond the taking over of physical possession of the banks and their assets by the Comision. In many instances the officers of banks were forced by imprisonment and intimidation to turn over to the Mexican Government parts or the whole of the metallic reserves of their respective banks, these monies being used not to conserve the reserves and to liquidate, but for the general administration expenses of the government and to pay the armies. Another frequent procedure was to demand, on order of Carranza, that the bank officials turn over to the mint of the Republic for immediate coinage the bars of silver and gold held in the bank vaults as part of the metallic reserve. When this was done, generally only a small part of the coin specie was returned to the banks.

In spite of the control of the banks by the Department of Finance, they were forced from time to time to make so-called loans to the government. In most instances these loans consisted of forcible extractions from the vaults of the banks, without provision for repayment.

These exactions of forced "loans" were in clear contravention of good international practice. They might be supported as necessary emergency measures, but the methods employed in executing these measures withdrew from them

any possible sanction that international law might have given them. Furthermore, it is clear that most of these exactions must be considered, from an international law viewpoint, as being not in the nature of extraordinary taxes, but as forced loans, and the obligation of the Mexican Government to make repayment for all such "loans" is unquestionably absolute.

On January 31, 1921, President Obregon issued a "Decree Regulating the Return and Liquidation of Suspended Banks." This decree provided in Art. 1 as follows:

"Art. 1. The banks which were declared to be in liquidation, by virtue of the decree of December 14th, 1916, shall recover their judicial personality and shall be returned to their legitimate representatives under the terms and conditions of this law."

The procedure for the return of the suspended banks is set forth in the decree in detail. It is probable that many of the banks which have been out of operation since 1916 will take advantage of the decree and attempt to resume business; several of the larger banks have already taken advantage of this decree. From the text of the decree it would seem that the same does not operate to destroy any claims the banks may have against the Government for losses sustained during the revolutions.

6.

Damages for Wanton and Unlawful Acts.

A nation is now undoubtedly held internationally responsible for damages to aliens occasioned by the wanton and unlawful acts of authorities or military forces.[1]

"We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the sword in cold

1 Mr. Seward, Sec. of State, to Mr. Dayton, Mar. 13, 1863, Ms. Inst. France XVI., 345; Mr. Frelinghuysen, Sec. of State, to Mr. Logan, June 7, 1883, Min. to Chile, June 7, 1883, For. Rel. 1883, 107. Mr. Bayard, Sec. of State, to Mr. Hall, May 27, 1886, MS. Inst. Cent. Am. XVIII., 615. Andrew Moss v. Chile, No. 25, United States and Chilean Claims Commission, 1901. See Mr. Blaine, Sec. of State, to Mr. Christiancy, No. 153, June 21, 1881, Ms. Inst. Peru, XVI., 501. The Commission disallowed a claim for the loss of property by the burning of Chorillos by the Chilean forces, the burning resulting from the taking of the place by storm. Peter Bacigalupi v. Chile, No. 42, United States and Chilean Claims Commission, 1901.

blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered, on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement of storming the place; and under that softer name of plunder it has sometimes been attempted to veil 'all crimes which man, in his worst excesses, can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them.' It is true that soldiers sometimes commit excesses which their officers can not prevent; but, in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them. The most atrocious crimes in war, however, are usually committed by militia and volunteers suddenly raised from the population of large cities, and sent into the field before the general has time or opportunity to reduce them to order and discipline. In such cases the responsibility of their crimes rests upon the state which employs them, rather than upon the general who is, perhaps, unwillingly, obliged to use them."[2] However, when no officers or officials of the government are in any way connected or identified with the transaction, no international liability arises.[3]

The Spanish Treaties Claims Commission held that Spain was entitled in endeavoring to repress the Cuban revolution to adopt "such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare," but that if "it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages, Spain will be held liable in that case."[4]

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2 Halleck's International Law and Laws of War (San Francisco, 1861, Sec. 22, p. 442), citing Kent's Commentaries, Vattel's Droit de Gens, and other authorities.

3 Mr. Fish, Sec. of State to Count Corti, Italian min. Dec. 9, 1872, MS. Notes to Italy, VII., 150; Moore, Int. Arbitrations, IV., 4029.

4 Statement by the president of the Spanish Treaty Claims Commission, Mr. William E. Chandler, Nov. 24, 1902, concurred in by Commissioners Diekema and Wood. (S. Doc. 25, 58 Cong. 2 sess.) Commissioners Maury and Chambers dissented for the reason that even though it was correct as an abstract proposition, it tended to qualify the liability of the United States under Art. VII, of the treaty of peace with Spain of Dec. 10, 1898. (S. Doc. 25, 58 Cong. 2 sess. 10, 12.) The foregoing propositions were repeated, under the numbers 5 and 9, in a statement issued by the commission on April 28, 1903. (Id. 6, 7.)

When the claims against Mexico are presented, it will probably appear that many of them are based on the wanton acts of military forces. The Federal Army has always been principally composed of uneducated and not entirely civilized Indians, and largely of former bandits inveigled into the Federal service, as much, in some cases, to keep them out of mischief as for their military value. In the execution of their military purposes, soldiers of this type are very likely to be only semi-disciplined and to indulge in excesses and unnecessary wanton acts. Each successive revolutionary movement has called to its standards a miscellany of banditti, discontents and malefactors. These conglomerate forces have represented all stages of civilization and morality, consequently, inasmuch as liability for the acts of these revolutionary forces became merged in the Federal liability upon the success of the particular revolution which they assisted, the Federal liability is likely to be extensive.

7.

Railroad Claims.

Three classes of railroad claims may be anticipated: (1) those arising out of the guaranty by the Mexican Government of railroad bonds and securities. These claims are considered elsewhere herein. (Chapter IV-B).

(2) Claims arising out of the operation of the roads after their seizure by the Carranza Government.

(3) Claims based on the destruction of railroad properties.

The second and third classes of claims are covered by provisions of the Mexican Law.

Acting entirely within its rights, the Mexican Government, during the revolution, took over the management and operation of privately-owned railroads. Chapter VIII of the Railroad Law of Mexico is entitled, "Rights Reserved to the Nation." It says in part as follows:

> "Art. 145. The Nation will have the following rights:
>
> * * * * * * *

"X. The federal authorities are entitled, in case, in their opinion, the defense of the country requires it, to make requisitions on the railroads, their personnel and all their operating material and to dispose of them as they may consider advisable.

"In this case the Nation shall indemnify the railroad companies. If no agreement is reached as to the amount of the indemnification, the latter shall be based on the average gross earnings in the last five years, plus ten per cent, all expenses being borne by the company.

"If only a part of the material is required the provisions of paragraph IV of this article will be observed

"XI. In the event of war or of extraordinary circumstances, the executive may take measures to render unserviceable either the whole or part of the road, also the bridges, telegraph lines and signals forming part of the road.

"What may have been destroyed shall be replaced at the cost of the Nation, as soon as the Nation's interests allow of it.

"XII. In case the executive orders the suspension of the service, for the sake of the country's defense or the public peace, it may also order that all the rolling stock and any other material shall be removed.

"In such cases the war department will determine the places to which said material is to be taken."

It will be observed that this article clearly gives the Mexican Government the right to take over the roads in cases of public emergency. That the existence of revolution presents a public emergency is obvious. It will further be noticed that the second paragraph of section X provides specific indemnification for the owners of the road. The second paragraph of section XI providing for the replacement at the cost of the Nation of property destroyed under governmental direction in times of national stress, is peculiarly worded, inasmuch as it provides for replacement "as soon as the Nation's interests allow of it." The wording of this phrase might permit the Government to delay the date of reparation until it has sufficiently recovered from the National emergency to make provision for such reparation. The obligation, however, to replace is absolute.

Claims based simply upon injuries to railroad properties occasioned by the acts of revolutionaries or bandits, are treated elsewhere. Probably only when there is present wantonness, maliciousness, negligence or similar factors will liability fall upon the Government.

There is nothing in the nature of claims under classes (2) and (3) noted above which would, without a denial of justice, bring them into the group of those for which diplomatic interposition would be possible. As above indicated, the Mexican law makes ample provision for reparation and compensation and the private owners would undoubtedly have to seek their local remedies before they could obtain the aid of their own governments, unless Mexico consents to include such claims in an eventual arbitration.

8

Federal Liability for the Acts of Insurgents and Revolutionaries.

If the insurgents eventually become successful in their movement, liability for their acts will be merged in the general liability of the Government.[1] It is the liability of the nation for the acts of unsuccessful insurgents that will be here considered.

"The general rule is that a sovereign is not ordinarily responsible to alien residents for injuries they receive on its territory from belligerent action or from insurgents whom he can not control."[2] "They are not entitled to greater privileges or immunities than the other inhabitants in the insurrectionary district. * * * By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks, as well as the advantages of that domicile."[3]

The government is not responsible for the acts of insurgents or revolutionaries when it has given all the protection in its power, is not itself culpable, and the revolution has gone beyond

1 This subject is discussed in Chapter I-C.

2 1 Amer. Journal of Int. Law 35; 6 Moore's Dig., pp. 885, 886. See also, Wharton, pp. 577, 578; 6 Moore's Dig., Secs. 1032-1049.

3 Secy. Seward to Count Wydenbruch in 1865; 6 Moore's Dig., p. 885; 1 Amer. Jour. Int. Law, 36.

control.[4] There is no federal liability when the revolution has reached the state where the whole government forces are needed to combat it. The United States disclaimed liability for the acts of the confederacy in part on this ground.[5]

Recognition of the insurgents as belligerents relieves the Federal government of responsibility for the acts of the insurgents against nationals of the recognizing nation. This was true in the case of the recognition by England and France of the belligerent status of the confederacy.[6]

A state may avoid liability for the acts of insurgents within its borders by recognizing their belligerent status.

Aliens cannot claim the protection of a state if they enter a part of the territory notoriously in a condition of upheaval, or when the government has decreed that they do so at their own peril.[7] But "the mere 'revolutionary state' of a part of Mexico can not be accepted by the United States as a defense to a claim on Mexico for injuries inflicted on citizens of the United States in Mexico in violation of treaty engagements."[8]

President Jackson in his annual message, December 7, 1835[9] said: "Unfortunately, many of the nations of this hemisphere are still self-tormented by domestic dissensions. Revolution succeeds revolution; injuries are committed upon foreigners engaged in lawful pursuits. Much time elapses before a government sufficiently stable is erected to justify expectation of redress. Ministers are sent and received, and before the discussions of past

4 Moore's Int. Arbi., V, 4615-17; 212 MS. Dom. Let. 450; Mr. Seward, Sec. of State, July 9, 1868; 79 MS. Dom. Let. 69; Mr. Olney, U. S. Sec. of State, Jan. 29, 1896, to Mr. Thompson, Min. to Brazil, Ms. Inst. Brazil, XVIII., 171; Mr. Olney to the President, Dec. 7, 1896, For. Rel. 1896, LXXXII. and LXXXV.; Mr. Uhl, Acting Sec. of State to U. S. Vice-Counsel General at Havana, July 1, 1895, For. Rel. 1895, II., 1216.

5 Moore's Int. Arbi., II., 1622, III., 2982-85.

6 See Mr. Adams, Min. to England, to Mr. Seward, Sec. of State of U. S., June 14, 1861; Diplomatic Correspondence 1861, 87, 89; and Mr. Seward, Sec. of State to Mr. Dayton, Min. to France, Jan. 12, 1864, Dip. Cor. 1864, III., 17; 6 Moore's Dig. 956, 957.

7 Mr. Davis, Acting Sec. of State, to Mr. Markbreit, Min. to Bolivia, No. 55, July 7, 1871, MS. Inst. Bolivia, I., 145. In this connection see Chapter V, Part C, Section 10. See also the case of the "Seven Mexican Shepherds" cited in Chapter IV, Part H, Section 2.

8 Mr. McLane, Sec. of State, to Mr. Butler, Min. to Mexico, June 20, 1834, MS. Inst. Mex. XV., 27; Wharton Int. Law Digest II., 576, Sec. 223.

9 Richardson's Messages, III., 147, 151.

injuries are fairly begun fresh troubles arise; but too frequently new injuries are added to the old, to be discussed together with the existing government after it has proved its ability to sustain the assaults made upon it, or with its successor, if overthrown. If this unhappy condition of things continue much longer, other nations will be under the painful necessity of deciding whether justice to their suffering citizens does not require a prompt redress of injuries by their own government competent and enduring enough to discuss and to make satisfaction for them."[10]

It is reasonably well settled that liability will arise where the injury violates a treaty right and there is no other form of redress; where there has been undue discrimination against foreigners in adjudicating or allowing claims; where there has been an evident denial or palpable violation of justice; and, perhaps, even where international law and the rules of civilized warfare are seriously violated.[11]

The liability of a state is undeniable where it has been negligent or has lacked *due diligence*.[12] The following excerpt from Samuel B. Crandall on "Law Applied by Spanish Treaty Claims Commission,"[13] states clearly the rules of *due diligence* applied by that Commission:

" 'The Commission having previously held that the insurrection from the first, as a whole, went beyond the control of Spain, and it appearing and being conceded by the claimant in this case

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10 Richardson's Messages, III, 147, 151.

11 See article by Amos S. Hershey, "Calvo and Drago Doctrines," 1 A. J. I. L. 36.

12 Mr. Olney, Sec. of State, to Messrs. Lauman & Kemp, Jan. 13, 1896, 207 MS. Dom. Let. 146; Ralston, Umpire, case of Sambiaggio, Italian-Venezuelan Mixed Commission, protocol of February 13, 1903, Ralston's Report 666; case of Guastini, id. 730, 747; and other cases, id. 753, 769, 810, 816. This ruling was followed by Duffield, Umpire, case of Van Dissel & Co., German-Venezuelan Mixed Commission, protocol of February 13, 1903, Ralston's Report, 565, 573; also by Plumley, Umpire, case of Aroa Mines Co. (Limited), British-Venezuelan Mixed Commission, protocol of February 13, 1903, Ralston's Report 344, 350; and case of Henriquez, Netherlands-Venezuelan Mixed Commission, protocol of Feb. 28, 1903, Ralston's Report, 896; and also in another case, id. 903. It was also held by the American-Venezuelan Mixed Commission, under the protocol of Feb. 17, 1903, in Jarvis' case, in an opinion delivered by Bainbridge, the American commissioner, that the Venezuelan Government could not be held liable for the payment of bonds issued by unsuccessful revolutionists in payment of services rendered them. Ralston's Report, 145; 6 Moore's Dig. 972.

13 IV., A. J. I. L. 818.

that the Spanish troops did not fail to use due diligence on the 15th of December at Hormiguero, it is questionable whether the Commission is authorized to review the military situations and operations at the various times and places mentioned, so remote were they from the 15th of December and Hormiguero, and to condemn the plans, acts, omissions of the military commanders as proving such a lack of due diligence on the part of the Spanish authorities as to make Spain liable for the damages done by the insurgents at that time and place. At all events, it is certain that no legal precedents have been found which would in our opinion, justify the Commission in entering upon such review and condemnation.'

"Under this ruling of the Commission, in order to establish liability of Spain for damages by insurgents it was necessary to prove the failure of the Spanish authorities at the time and place to exercise due diligence in affording protection. A large amount was claimed, before the Commission for the burning of cane by the insurgents. Early in the insurrection the general in charge of the Cuban forces, with the twofold purpose of depriving the Spanish Government of revenue and of compelling, by removing the possibility of employment, the colonos and laborers on the sugar plantations to join the Cuban forces, ordered the burning of cane fields. The order was subsequently limited to those estates which attempted to grind. The evidence taken in the cases before the Commission clearly established as a general proposition the impossibility of protecting, by forces of the regular army, the extensive cane fields throughout the Island. In only one case, that of the Central Tuinucu Sugar Company, No. 240, was recovery for the burning of cane fields by the insurgents granted. The facts in this case were peculiar. The Commission found in this case evidence to show that the insurgents threatened to destroy the property if an attempt at grinding was made, that the Spanish authorities ordered the claimant to proceed with the grinding and promised protection. While a Spanish force of 350 men was erecting fortifications on the batey, the insurgents began burning the cane fields of the estate and continued burning them for several days, until the fields were nearly all burned. The Spanish forces remained within the batey and made no ef-

fort to prevent the burning. It was contended by the defendant that it was a question of military discretion, which could not be reviewed by the Commission, on the part of the commanding officer whether he should divide his forces in order to prevent the burning of the cane, and possibly so weaken the force on the batey as to enable the insurgents to burn the mill or whether he should keep his forces united for the protection of the buildings of the batey. The Commission held, however, that the Spanish authorities were negligent and made an award accordingly.

"In the case of Rodriguez, No. 479, an award was made for the destruction of household goods by the insurgents, the Spanish authorities having arbitrarily refused the claimant permission to remove them to a place of safety. So also in the case of Thorne, No. 248, an award was made for a quantity of tobacco burned by the insurgents, it appearing to the Commission that the claimant had been prevented by the Spanish authorities from removing it to a place of safety. In reporting these cases the Commission says:

"'In neither of the above-cited cases was it shown that by reasonable diligence the Spanish Government could have prevented the destruction of the buildings, but having unreasonably refused to permit the removal of the household goods in the one case, and having actively and without warrant interrupted and prevented the removal of the tobacco in the other case, awards were made the respective claimants, the Commission feeling that it was justified under the broad jurisdiction granted it by statute to disregard the strict application to these cases of the common-law principles which, if applied, would perhaps have prevented a recovery and defeated what were regarded by the Commission as meritorious claims.' "[14]

Mr. Bayard, then Secretary of State of the United States, in a communication to Mr. Sutphen, on January 6, 1888,[15] in discussing the rules of *due diligence* applicable to this subject, states that they must be held to vary with the nature of the insurrection, the territory involved and the situation, and quoted Mr. Fish in his instructions to Mr. Foster of August 15, 1873, when

14 Vol. IV., Amer. Journ. Int. Law, 818.
15 166 MS. Dom. Let. 509.

discussing the United States claims against Mexico for injuries sustained from insurrectionary violence, as saying that the rule sustaining such claims "should not always apply to persons domiciled in a country and rarely to such as may visit a region notoriously in a state of civil war."

Mr. Bayard cited several other important precedents—cases in which the United States had disclaimed liability, or refused to hold another nation liable, on the ground that sufficient diligence had been employed, or that the claimant had voluntarily subjected himself to undue risk. Moreover, he pressed the theory that the continued maintenance of an insurrection is *"prima facie* proof of *vis major* which throws upon the party alleging particular negligence the burden of proving it," continuing as follows:

"Nor can the Department refuse to apply to citizens of the United States visiting foreign lands where insurrections for the time prevail, or the local government is powerless to suppress sudden tumults, the rule that it applied to foreigners who visited portions of our territory where insurrections for the time prevailed, or when the local government was without the power to repress sudden tumults. Spain can not be held to a greater degree of liability to foreigners for losses incurred by reason of lawlessness in Cuba, than is the United States for similar disorders within its jurisdiction; nor can the United States claim for its citizens residing voluntarily in foreign lands, immunities which it will not concede when claimed against itself. We hold that foreigners who resort to localities which are the scenes of lawless disorder in this country do so at their own risk, and must apply the same rule to our own citizens in foreign lands."

H.

ACTS OF PRIVATE PERSONS.

I.

In General.

To give rise to the responsibility and liability of the Mexican Government in the case of injuries by individuals acting alone or in groups as brigands or mobs, some independent delinquency of the Government itself, a failure after opportunity afforded either to prevent the injury or to punish the guilty must be shown. A government is not, as is so often erroneously assumed, a guarantor of the security of aliens. Under ordinary circumstances, a government is merely under a duty to furnish governmental machinery which normally would protect the alien in his person and property. This does not mean that this machinery must be so efficient as to prevent all injury to aliens, but merely that it must be so organized, constituted and operated that a violent assault of one individual upon another is only a fortuitous event. Under the particular circumstances existing all reasonable measures must have been taken to prevent the injury and punish the guilty. As a corollary of this principle, a government's duty, and consequent responsibility for breach, is measured by its ability to protect the alien in a given case under given circumstances.[1]

Commissioner Wadsworth in the United States-Mexican Arbitration of 1868, expressed the opinion that the test of a nation's responsibility for injuries committed upon aliens in its territory by private citizens, is whether it has enforced its laws "with reasonable vigor and promptness to prevent violence when practicable, or failing in that to punish the offenders criminally, or to indemnify the injured party by [its] remedial civil justice."[2]

To render the Government liable, therefore, it has been established by precedents to be necessary for the claimants to prove some actual or implied governmental complicity in the act, before

1 Dowley (U. S.) vs. Costa Rica, July 2, 1860, Moore's Arb. 3032; Calvo, Droit International (6th ed.) Sec. 1274, makes the "facilities at hand" the test of responsibility. Mr. Hay, Secretary of State, to Mr. Dudley, Minister to Peru, September 5th, 1899, 6 Moore's Dig. 806. But the apprehension and punishment of the guilty will be demanded. Borchard, Diplomatic Protection of Citizens Abroad, Secs. 86, 87.

2 Mills (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3034.

or after it, either by directly ratifying or approving it,[3] or by an implied, tacit or constructive approval of the negligent failure to use *due diligence* to prevent the injury,[4] or to investigate the case, or to prosecute and punish the guilty individuals.[5] Incidental grounds would be: Inadequate punishment,[6] negligently permitting offender to escape,[7] inexcusable delay in investigating the facts,[8] or to enable the victim to pursue his civil remedies against the offenders.[9]

What is the *due diligence* which is contemplated by the rule as applied in the illustrations given above depends upon the circumstances of each case and is sometimes expressed by the phrase that "ability is a test of responsibility."

Notwithstanding this general rule, cases have not been infrequent where a more rigorous test of liability has been imposed, notably against more poorly organized or weak states like China, Turkey, Morocco and formerly Greece. Here liability for assaults by private individuals has been predicated, not on any imputed governmental complicity or negligence, but on the mere failure to prevent the injury.[10] In many of these cases there has

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3 Kane's notes on arbitration convention with France, 1831. Philadelphia 1836, p. 31. Piedras Negras claims (Mexico vs. United States, July 4, 1868, Moore's Arb. 3035).

4 Hubbell, et al. v. United States (1879), 15 Ct. Cl. 546 (Chinese indemnity); Alabama claim (U. S.) vs. Great Britain, May 8, 1871, 6 Moore's Dig. 999; Evarts (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 904. The recent case of "Pussyfoot" Johnson in London, where the police without resistance, it seems, permitted a mob to assault this individual, illustrates the rule of governmental liability.

5 De Brisset (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2858; Poggioli (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 869; Renton Claim v. Honduras, For. Rel. 1904, p. 363 (refusal to diligently prosecute and punish).

6 Lenz claim v. Turkey, Mr. Hay, Secretary of State, to Mr. Strauss, Mar. 25, 1899, For. Rel. 1899, p. 766.

7 Lenz and Renton cases, supra.

8 Ruden (U. S.) v. Peru, Dec. 4, 1868, Moore's Arb. 1653.

9 Unjustifiable pardon to the offenders—Montijo (U. S.) v. Colombia, Aug. 17, 1874, Moore's Arb. 1421, 1444. Cotesworth and Powell (Gt. Brit.) v. Colombia, Dec. 14, 1872, ibid., 2050, 2085.

10 Cases of private murder of aliens in China, reported in For. Rel. 1880, Japanese subjects murdered in China, 1874, Moore's Arb. 4857; Dreyfus, Arbitrage International, 176, 177; Lieut. Cooper claim (Gt. Brit.) v. Turkey, 1888, 81 St. Pap. 178; Caldera (U. S. v. China, Nov. 8, 1858, Moore's Arb. 4629; Hubbell v. United States, supra (based principally on treaty obligation); Russia v. Turkey, 1826 (Turkey held liable for depredations of Moorish pirates) 13 St. Pap. 899, 16 St. Pap. 647, 657. Five cases of British subjects injured in Greece, about 1850, by acts of individuals, Baty, 116-118; Marcea v. Morocco, 1900 (1901) 28 Clunet, 205. Murder of Italian soldier in Crete, 1906 (1907) 1 A. J. I. L. 158; (1906) 13 R. G. D. I. P. 223; Montijo (U. S.) v. Colombia, Aug. 17, 1874, Moore's Arb. 1421 ff. (absence of power considered equivalent to omission to use it.) Turkey and Morocco held responsible for acts of pirates from their shores on three occasions, (1905) 12 R. G. D. I. P. 563-565. "Insufficiency of the protective measures afforded," an alleged ground of liability in certain cases in Turkey, For. Rel. 1897, p. 592.

been a disregard of the rule that an individual assumes a risk in visiting notoriously unstable countries or regions, and the local government has been held to accountability as an insurer of the safety of aliens, or rather of the citizens of powerful countries. The weaker countries, notwithstanding their lesser ability to protect aliens, have thus in these instances been held to a higher degree of responsibility for the safety of aliens than strong states. This departure from principle has been strongly influenced by the fact that, in international relations, arguments are generally of importance according to the physical power of their proponents.

While a consular agent is usually only a local resident business man who exercises minor consular functions, he has, nevertheless, been deemed to be entitled to a measure of special protection by the local authorities not enjoyed by the ordinary private alien.[11] His official position alone, however, should not serve to make the local government an insurer of his safety, although this doubtless renders it more difficult for the government to overcome the presumption of negligence ordinarily attaching to a notorious act of brigandage in a populous town.

It is a fundamental principle that every nation, whenever its laws are violated by anyone owing obedience to them, whether citizen or alien, is privileged, free from interference by other states, to inflict the penalties incurred by the transgressor if found within its jurisdiction, provided that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of modern standards of civilized justice.[12] It, of course, sometimes appears that the criminal procedure of foreign countries contains harsher provisions and is deficient in many safeguards which the American law provides for the benefit of

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11 Attacks on German consulate in Havre, 1888, in Messina, 1888, and in Warsaw, 1901 (1889) 16 Clunet 250; Borchard, secs. 86, 90. French and German consuls murdered in Salonica, 1876, 67 St. Pap. 917; 6 Moore's Dig. Sec. 704, discusses cases in Venezuela, Peru, Nicaragua, Santo Domingo and United States. See the following authorities; Vattel, Chittys ed. Bk. IV, Ch. VI, Sec. 75, p. 469; Phillimore, II, Sec. 246, p. 263; Pradier-Fodéré, IV, Sec. 2108. But see case of Servian Vice-consul assassinated in Turkey, 1890, Baty, 224 and Wipperman (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3041, which were not taken out of the general rule of non-liability.

12 Mr. Marcy, Secretary of State, to Mr. Jackson, chargé at Vienna, January 10th, 1854, 2 Moore's Dig. 88; Ballis (U. S.) vs. Venezuela, Feb. 13, 1903, Senate Document 317, 58th Congress, Second Session, p. 376.

the accused. This, however, does not constitute ground for diplomatic complaint, as the right of the United States is confined and limited to a demand that its citizens be given the full and fair benefit of the system of law which exists, without discrimination in favor of natives or other aliens.[13]

2.

Acts of Individuals.

As a general rule a government is not liable for the acts of individuals. "By the law of nations, if the citizens of one state do an injury to the citizens of another, the government of the offending subject ought to take every reasonable measure to cause reparation to be made by the offended. But if the offender is subject to the ordinary processes of law, it is believed this principle does not generally extend to oblige the government to make satisfaction in case of the inability of the offender."[1] "The Government of the United States is not liable to foreign governments for misconduct of its private citizens within their jurisdiction, such citizens not being in any sense its representatives."[2]

The well known case of the seven Mexican shepherds is important at this point. These seven shepherds were hung by private persons in Texas near the Mexican border on November 8, 1875, after having been accused of cattle thefts. Mr. Mariscal, the Mexican Minister to Washington, on January 30, 1875, addressed a note to Mr. Fish, then Secretary of State of the United States, protesting against the inaction of the Texas and Federal police agencies in making only a laconic and perfunctory investigation of the affair, after the Mexican consuls at Brownsville and San Antonio had brought the matter to the attention of the proper officers of justice in Texas and had earnestly solicited an investi-

13 Mr. Marcy, Secretary of State, to Mr. Jackson, Apr. 6, 1856, 2 Moore's Dig. 89, 6 ibid, 275. See also the illuminating opinions in In re Neely (1900, C. C. S. E. N. Y.) 103 Fed. 626 and in Neely v. Henkel, (1901) 180 U. S. 109, 21 Sup. Ct. 302, by Justice Harlan.

1 Lincoln, At. Gen. 1802, 1 Op. 106, 107.

2 Mr. Forsyth, Sec. of State, to Mr. Calderon de la Barea, Sept. 17, 1839, MS. Notes to Spain, VI, 39. Governments do not undertake to reimburse persons for the criminal acts of individuals, such as theft. (Magoon's Reports, 471.)

gation and punishment of the guilty. The United States Government disclaimed any liability for the deaths. Mr. Fish, Secretary of State, on Feb. 19, 1875, in reply to the representations of Mr. Mariscal, said that it was the duty of a government to prosecute the offenders according to law by all the means in its power, but that if this duty were honestly and diligently fulfilled the Government was discharged from further obligation. "Though the crime," said Mr. Fish, "by which the Mexican shepherds are alleged to have lost their lives may not be without precedent, it seems obviously unreasonable, in view of the peculiar condition of the quarter where it was perpetrated, to expect that it would certainly be punished. * * * Mexicans in Texas and Americans in Mexico who engage in business near the border, must not at present or perhaps for some time to come expect either government to insure them against all the risks inseparable from such enterprises."[3] Mr. Fish through this statement placed the United States in the position of acquiescing in a theory so often advanced by Latin-American nations, that an alien entering a country or district in which normal conditions of peace are disturbed or in which the normal state of affairs is one of revolution and brigandage, cannot expect the same degree of protection to which he would be entitled in a normal or peaceful community—that he is put on notice of the dangers involved in residence or travel in such disturbed places and enters or remains at his own risk. In this connection it should be noted that the proclamation of President Wilson, quoted in Chapter V, Part C, Sec. 10, is very much in the nature of an application of Mr. Fish's rule to the residence or travel of citizens of the United States in Mexico.[4]

The general rule that there is no responsibility for acts of individuals applies equally to members of military forces.[5]

Where by reasonable care, however, the injury could have been avoided, the Government will be held responsible. "The

3 For. Rel. 1875, II, 973, 6 Moore's Dig. 788, 789.

4 For other cases where acts of individuals were not held attributable to the government, see the case of Jose D. Lamar, in Santo Domingo in 1886, 163 MS. Dom. Let. 306, 6 Moore's Dig. 780, also Mr. Sherman, Sec. of State, to Mr. Hoshi, Japanese min., March 31, 1897, For. Rel. 1897, 368.

5 S. Ex. Doc. 35, 52 Cong. 2 Sess.

government of a foreign state is liable not only for any injury done by it, or with its permission, to citizens of the United States or their property, but for any such injury which by the exercise of reasonable care it could have averted."[6]

The United States Government in the case of Frank Lenz an American, murdered in 1894, by nationals in Turkey,[7] successfully pressed a claim against the Turkish government on the ground of negligence in punishing the offenders.

In the case of Galeb Abdullah, a Turkish subject, killed in California, in 1891,[8] that of Jos. N. Adir, an Ottoman, killed in Washington in 1893,[9] and that of "Harry the Turk" who disappeared in Portland, Maine, in 1896,[10] the United States disclaimed liability on the ground that no negligence could be attributed to the government.

In regard to the United States claim for the murder of Charles W. Renton, in Honduras in 1894, Moore in his Digest,[11] quotes United States Secretary of State, Mr. Hay, as follows: "While a state, said Mr. Hay, is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the state diligently to prosecute and properly to punish the offenders; and 'for its refusal to do so it may be held answerable in pecuniary damages.'"

3.

Mob Violence.

The sound rule of international law is undoubtedly that a government should indemnify foreigners for injuries to persons and property as the result of mob violence directed at them as

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6 Report of Dr. Francis Wharton, Solicitor of Dept. of State, affirmed by Mr. Bayard, Sec. of State, to Mr. Scruggs, min. to Colombia, May 19, 1885, For. Rel. 1885, 212. As to the difficulties between France and Santo Domingo and the Caccavelli incident, see For. Rel. 1895, I, 235. The Caccavelli incident related to the murder of a French merchant of that name at Samana.

7 See Doc. 33, 54th Cong. 1st Sess. For Rel. 1895, II, 1257; For. Rel. 1895, II, 1315, 1332. 6 Moore's Dig. 792; For. Rel. 1899, 766-7, 6 Moore's Dig. 794. New York Times, Jan. 8, 1902.

8 MS. Notes to Turkey, II, 115, id. 122, 6 Moore's Dig. 793.

9 MS. Notes to Turkey, II, 115.

10 MS. Notes to Turkey, II, 115, 122, 6 Moore's Dig. 793.

11 Vol. 6, p. 798.

foreigners, and where the local authorities were unwilling or unable to prevent the injuries and the courts unable or unwilling to punish the criminals.[1] Where none of these elements are present all that can fairly be expected is a prosecution of the offenders according to law in good faith and to the extent of the Government's power.[2]

Elihu Root in an article, "The Basis of Protection to Citizens Residing Abroad,"[3] discusses the subject with force and clarity.

"The foreigner is entitled to have the protection and redress which the citizen is entitled to have, and the fact that the citizen may not have insisted upon his rights, and may be content with lax administration which fails to secure them to him, furnishes no reason why the foreigner should not insist upon them and no excuse for denying them to him. It is a practical standard and has regard always to the possibilities of government under existing conditions. The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps.

"The diplomatic history of this country presents a long and painful series of outrages on foreigners by mob violence. These have uniformly been the subject of diplomatic claims and long-continued discussion, and ultimately of the payment of indemnity. An examination of these discussions will show that in every case the indemnity was in fact paid because the United States had not done in the particular case what it would have done for its own citizens if our laws had been administered as our citizens were entitled to have them administered. Of course, no government can guarantee all the inhabitants of its territory against injury inflicted by individual crime, and no government can guarantee the certain punishment of crime; but every citizen is entitled to have police protection accorded to him commensurate with the exigency under which he may be placed. If he is able to give notice to the government of intended violence against him he is entitled to have due measures taken for its prevention, and he is entitled always to have such vigorous prosecution and punish-

1 1 Am. Journ. Int. L. 34.
2 6 Moore's Dig. 115, 1 A. J. I. L., p. 6.
3 Vol. IV, A. J. I. L., p. 523 and 525, et seq.

ment of those who are guilty of criminal violation of his rights that it will be apparent to all the world that he cannot be misused with impunity and that he will have the benefit of the deterrent effect of punishment."

Mr. Root discusses at some length cases of mob violence in the United States and the several attempts of the United States Government to avoid liability under the pretext that there existed no legal facilities for protecting aliens, and concludes his discussion with these words: "It is to be hoped that our Government will never again attempt to shelter itself from responsibility for the enforcement of its treaty obligations to protect foreigners by alleging its own failure to enact the laws necessary to the discharge of those obligations."

4.

Brigandage.

In the case of the murder of Knapp and Reynolds in the village of Ghuorie, Turkey, by notorious brigands, the United States Government did not rest until the brigands and the culpable officials who had previously neglected or refused to apprehend them had been punished.[4]

In a discussion of brigandage, the case of Leo M. Baldwin, a citizen of the United States killed by bandits in Mexico, is particularly valuable.[5] Although settled without prejudice to the contentions of either State, the case brings up clearly the issues involved in a typical brigandage case. Baldwin, who was Superintendent of the Valencia Mine in the State of Durango, Mexico, was shot and killed by two alien outlaws in Ventanas on August 19, 1887. This was only one of a series of violent acts of bandits in this section. One of the bandits was supposed to have been a native official of some prominence in Ventanas. The Mexican Government it was alleged did nothing to make life and property secure in this district and there was evidence that the acts of the bandits had been partially inspired by race hatred. Mr. Blaine, Secretary of State of the United States, in instruc-

4 For. Rel. 1883, 850, et seq., For. Rel. 1884, 532, et seq., For. Rel. 1885, 827, et seq., For. Rel. 1889, 725-728. 6 Moore's Dig. 800.

5 Discussed in 6 Moore's Digest, p. 801.

tions to Mr. Dougherty, Chargé,[6] made the following comment on the case, which it seems advisable to include here at some length:

"Mr. Mariscal, however, also refers to the rule laid down by the United States on several occasions in respect to the liability of a government for injuries caused by mob violence, as an answer to the claim made in the present case. The leading instance cited by him in this relation is that of the outrages upon the Chinese, in respect to which the Government of the United States denied its legal liability to respond in damages, although in reality it has paid more than half a million dollars to the Chinese Government for the relief of the sufferers. The attacks upon the Chinese and the killing of Mr. Baldwin, possess, indeed, certain similar features. Both were directed against foreigners; both were actuated in a measure by prejudice growing out of differences in nationality; and both were committed in wild and sparsely settled regions. But here the parallelism ends. The Chinese outrages were a sudden and violent outbreak of one body of aliens against another. So that this Government, replying, on the 18th of February, 1886, to the representations of the Chinese minister, said: 'The attack upon them [the Chinese], as your [the Chinese minister's] note truly states, was made suddenly by a lawless band of about 150 armed men, who had given no previous intimation of their criminal intent.'

"In the case of Mr. Baldwin, the amplest notice was given both to the Federal and State authorities of Mexico of the lawless proceedings of those who committed that crime. * * *

"To sustain this denial of redress Mr. Mariscal has invoked the familiar rule that the measure of protection and of privilege to which foreigners residing in a country are entitled is that which the government of the country accords to its own citizens. As a general proposition, this rule is undoubtedly acceptable; but its applicability is by no means universal. Where the question to be determined is the measure of private rights and remedies under the municipal law, the rule above stated may, with certain well-settled exceptions, readily be adopted. But, where a gov-

6 No. 430, Jan. 5, 1891, MS. Inst. Mex. XXIII, 14, 21, 6 Moore's Dig., p. 802.

ernment asserts that its citizens in a foreign country have not been duly protected, it is not competent for the government of that country to answer that it has not protected its own citizens, and thus to make the failure to perform one duty the excuse for the neglect of another.

"It is true that in this way foreigners may enjoy an advantage over the citizens of a country. This, however, is not a matter for foreign governments to consider. They have no power to regulate the relations of another government to its citizens; nevertheless, they are bound to ask that their own may be protected.

"* * * It is not, * * * my purpose to enter into a disquisition upon the utterances of publicists as found in their works. I will, however, quote from the last edition of Calvo's exhaustive treatise on international law the following pertinent passages:

"'Section 1271. Any person disturbing public tranquillity, or violating the sovereign rights of a nation, or its laws, offends the state, declares himself its enemy, and incurs just punishment. His responsibility is not less when, instead of attacking the state, the crimes or offenses of which he has been guilty menace personal safety or the rights and property of individuals. In both cases, the government would fail to perform its duty if it did not repress the injury committed and cause the offender to feel the weight of its penal legislation. The state is not only under obligations to secure the reign of peace and justice among the different members of the society whose organ it is; it must also see, and that most carefully, that all who are under its authority offend neither the government nor the citizens of other countries. Nations are obliged to respect one another, to abstain from offending or injuring each other in any way, and, in a word, from doing anything that can impair each other's interests and disturb the harmony which should govern their relations. A state that permits its immediate subjects or citizens to offend a foreign nation becomes a moral accomplice in their offenses and renders itself personally responsible.

"'As regards its enforcement, this principle has nothing absolute, and admits of reservations inherent in the very nature of things; for there are private acts which the most vigilant author-

ity can not prevent, and which the wisest and most complete legislation can not always hinder or repress. All that other nations can ask of a government is that it shall show that it is influenced by a deep sense of justice and impartiality, that *it shall admonish its subjects by all the means in its power that it is their duty to respect their international obligations,* that it shall not leave offenses into which they may have been led unpunished; and finally, that it shall act in all respects in good faith and in accordance with the precepts of natural law; to go beyond this would be raising a private injury to the magnitude of a public offense, and would be holding an entire nation responsible for a wrong done by one of its members. * * *

"'Section 1274. * * * When the Government has had knowledge of the act from which the damage has resulted and has not displayed due diligence in preventing it or in arresting its consequences, either with the means at its disposal, or with those which it might have asked from the law-making power, the State will be responsible for willful neglect of diligence. In that case, the degree of responsibility of the State will have for its basis the facilities (whether greater or less) which it had for making previous provision for the act, and the precautions (whether greater or less) which it was in its power to take to prevent it.'

"The passages above cited are sustained by the learned author with ample citations of authority and an exhaustive review of the precedents. The United States asks nothing more than is due to it under the rule laid down by the distinguished Argentine publicist.

"Mr. Mariscal has also invoked the familiar rule that claimants must pursue their remedies in the courts of the country before they can resort to diplomatic intervention. As a general proposition this rule may be accepted as true. But it is obvious that it is applicable only where adequate judicial remedies exist for the redress of the grievance complained of. In the present case no such remedies have been alleged to exist, and the subject-matter of the complaint is not, in reality, one of judicial cognizance. This Government is not aware of any courts or of any processes by which the issue could be tried and redress obtained by the claimant in Mexico. Nor, where the question presented is

whether the Government of a country has discharged its duty in rendering protection to the citizens of another nation, can it be conceded that that government is to be the judge of its own conduct."[7]

When James H. Duvall, a citizen of the United States, was killed by highwaymen, in Mexico, Mr. Gresham, Secretary of State,[8] said: "The Mexican authorities promptly apprehended the murderers and the Department understand that they were tried, convicted, and punished. Under these circumstances it is not believed that any claim for damages could be maintained."

In 1868 John Braniff was killed by a band of robbers while at work on the Vera Cruz railroad. The American Chargé reported to the State Department that Mexico would investigate and make reparation. Secretary Seward replied: "The engagement which the Mexican Government has made to investigate the case, and its assurance that upon such investigation the Government would direct what justice may require, is entirely satisfactory."[9]

In a case where injuries had been inflicted on United States citizens by bandits in the interior of Persia, the United States Government demanded merely the apprehension and punishment of the offenders.[10]

The Rev. Benj. W. Labaree, an American missionary in Persia, and his servant, were barbarously killed by a body of religious fanatics. Upon the failure of the Persian government to apprehend and punish the criminals the United States Government made strong representations to Persia which resulted in the settlement as follows: (1) $30,000 cash in gold; (2) effective and swift punishment of all guilty persons; (3) no special tax on the province or on Christians to cover the indemnity.[11]

Very strong representations were made by the United States in the Perdicaris case. "On the night of May 18, 1904, a band of natives, headed by a 'bandit' named Raisuli, broke into the

7 Mr. Blaine, Sec. of State, to Mr. Dougherty, chargé, No. 430, Jan. 5, 1891, MS. Inst. Mexico, XXIII, 14, 21.

8 In a message to Mrs. Robinson, Sept. 20, 1894, 198 MS. Dom. Let. 637. 6 Moore's Dig. 806.

9 U. S. For. Rel. 1868, p. 582, Amer. Journal of Int. Law, Vol. I, p. 5.

10 210 Sept. 5, 1899, MS. Inst. Persia, XVIII, 177, 6 Moore's Dig. 806.

11 For. Rel. 1904, 657-677, 835. 6 Moore's Dig. 807.

country house of Ion Perdicaris, an American citizen, about three miles from Tangier, and carried him away, together with his stepson named Varley, a British subject. The consul-general of the United States and the British minister informed the Sultan's deputy that the Moorish authorities were to be held personally responsible, and, in order to secure the release of the captives, insisted that any terms demanded by Raisuli be immediately granted. The South Atlantic Squadron of the United States was ordered to Tangier. Long negotiations ensued between the Moorish authorities and Raisuli for the payment of a ransom and the release of the prisoners. On June 22, 1904, Mr. Hay telegraphed to the American consul-general at Tangier that the United States 'wants Perdicaris alive or Raisuli dead,' and that further than this the least possible complication with Morocco and other powers was desired. The consul-general was directed not to arrange for landing marines or seizing custom houses without specific instructions. The captives were released on the 24th of June. A British man-of-war, which had been at Tangier, left on the 25th and the American squadron departed two days later."[12]

Indian depredations present cases where the responsibility of the government, by reason of its laxity, must be very clearly shown. "The Department of State, while declining to present a claim to the Mexican Government for the murder of a citizen of the United States by Indians in Mexico, said: 'It is noticed, however, that you allege that the Indians were incited to make their attack on the person and property of your husband by the authorities of Yucatan. If this can be shown the Mexican Government may be held accountable therefor.' "[13] "The Canadian government held that it was not liable to pay compensation for horses stolen from a citizen of the United States by the Blood Indians."[14]

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12 For. Rel. 1904, 496-504. As to the action of France, see For. Rel, 1904, 307; and of Great Britain, id. 338; 6 Moore's Dig. 807.

13 Mr. Cadwalader, Act. Sec. of State, to Mrs. Stephens, Dec. 24, 1875, 111 MS. Dom. Let. 227; 6 Moore's Dig. 808.

14 Mr. Sherman, Sec. of State, to Mr. Hay, ambass. to England, No. 285, Oct. 27, 1897, MS. Inst. Great Britain, XXXII, 276; Mr. Adee, Second Assist. Sec. of State, to Mr. Walton, Oct. 27, 1897, 222 MS. Dom. Let. 51, enclosing copy of a despatch from Mr. Hay, No. 139, Oct. 8, 1897; 6 Moore's Dig. 808.

To summarize the liability of the Mexican Government for brigandage, it may be said that there is no liability unless the Government has been negligent either in prevention or cure. If the acts could have been prevented by reasonable vigilance, or the perpetrators punished by reasonable diligence, and did escape punishment because of the laxity of the Mexican Government, there is liability. Where the district within which the brigandage occurred was in a condition making it practically impossible for the state to prevent brigandage or to punish the offenders, there is no liability.[15]

15 Borchard Dip. Prot. Cit. Abr., p. 788.

CHAPTER V.

OBSTACLES AND DEFENSES TO PRESENTATION OF CLAIMS.

Certain conduct on the part of the claimant will have the effect of vitiating even an undoubtedly just claim. Such conduct, if brought to the attention of the claimant's government, should induce it to refuse diplomatic aid to the claimant. Such conduct, if found to have been present, will result in the dismissal of the claimant's case before a claim's commission or other body organized to investigate and adjudicate international claims.

Conduct of this nature will be divided into three classes:

A. Expatriation.

B. Renunciation.

C. Censurable Conduct.

A.

EXPATRIATION.

Diplomatic protection may be forfeited by voluntary expatriation. The United States, in the Act of Congress of March 2, 1907, named four methods of expatriation: (1) Foreign naturalization; (2) Taking oath of allegiance to a foreign state; (3) Marriage of an American woman to a foreigner; and (4) Residence abroad for certain periods of time, of a naturalized citizen.

But a citizen cannot expatriate himself during war.[1] Nor can a corporation expatriate itself.[2] The expatriation laws of states differ widely and the status of a citizen and the degree of protection accorded him in view of a possible expatriation law, depend upon the laws of his home state.

The United States, during the great war, passed a statute permitting repatriation by oath of citizens who had expatriated themselves by enlisting in the military or naval forces of and swearing allegiance to a state at war with the Central Powers. This Act may be found in 1918 Compiled Statutes Compact Edition, §4352 (12).

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1 H. Doc. 326, 59th Congress, 2d Sess., 28.
2 Moore's Arbitration, 2319.

B.

RENUNCIATION.

1.

Contractual Renunciation.

The Latin-American states have been the chief contenders for the principle commonly called the Calvo Doctrine, after its greatest enunciator, its theory being that renunciation by contract is effectual. In Chapter I, Part B above, it has been shown that the attempt to introduce renunciations through constitutional and municipal provisions has been futile and that the provision of the Mexican Constitution of 1917, providing that foreigners cannot acquire lands, waters and concessions without renouncing their citizenship and the right to appeal to their home governments for diplomatic aid in respect to such property, would not be held in accord with international law. Renunciations made because of this provision would not be binding upon aliens in Mexico. Actual contractual renunciations have been denied effect by Great Britain, Germany and the United States; but the Calvo Doctrine is firmly supported by the Latin-American states, who refuse to recognize the opposing theory that such contract terms are invalid internationally.

2.

Implied Renunciation.

Many acts of the citizen abroad imply a renunciation of protection. Among them are failure to register at his consulate; protracted residence abroad; departure from the country soon after naturalization with evident intent to return to domicile in the country of origin or previous allegiance; belligerent domicile; censurable conduct in certain instances (See Part C of this chapter); accepting public office or employment abroad when an unqualified oath of allegiance is required or when the employment is essential politically; military service for a foreign nation (temporary renunciation in most cases); the exercise of political rights or participation in politics in a foreign country if such participation involves identification with a foreign government.[3]

3 See Borchard Dip. Pro. of Cit. Abr'd., Sec. 379, 380.

C.

CENSURABLE CONDUCT.[4]

1.

In General.

Governments and Claims Commissions have introduced a variety of principles into the general rules of censurable conduct which will be taken up in some detail later. These principles may be summarized by the following well-known maxims:

"No one can profit by his own wrong."
"He who comes into equity must come with clean hands."
"*Ex dolo malo non oritur actio.*"

In his report to the President Jan. 20, 1887,[5] Mr. Bayard, then Secretary of State of the United States, said: " 'The principle of public policy,' said Lord Mansfield, in *Holman* v. *Johnson*, Cowper's Rep., 343, 'is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.' *Ex turpi causa non oritur actio;* by innumerable rulings under the Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied. The *lex fori* determines the question of turpitude. * * *."

2.

Concealment and Denial of Citizenship.

Many countries, and among them Mexico, require foreigners to register their nationality periodically before their respective consulates. And, though failure to do so would not preclude interposition by their home governments, such a failure might operate to bring the case within the application of the principle that a concealment or denial of citizenship will destroy, or deduct from, the protection accorded the citizen.

4 The classification of censurable conduct adopted in the discussion is largely that used by Borchard in his Diplomatic Protection of Citizens Abroad.

5 For. Rel. 1887, 592, 607, S. Ex. Doc. 64, 49 Cong. 2d Sess.; Moore's Int. Arb. II, 1793-1800.

Thornton & Lieber, Umpires of the United States-Mexico Mixed Claims Commission of 1868, held that the failure of Americans to comply with the provision of the Mexican Constitution of 1857 demanding that foreigners acquiring land register their desire to retain their foreign citizenship, or else become automatically Mexican citizens, did not deprive them of their United States citizenship and so of the protection of their home government.[6] The precedent would apply equally well to the Mexican Constitution of 1917, which contains a provision similar in its effect to this one of the Constitution of 1857. And so with the requirements of Chili and Mexico that foreigners must take out a "carta de seguirdad."[7]

These precedents are in accord with the principle (see Chapter I, Part B) that an alien cannot be deprived of foreign citizenship by municipal regulation. But the fact that the claimant has failed to assert or has concealed his citizenship, may undoubtedly be taken into account when considering the *quantum* of protection to be granted the claimant. Such conduct on the part of the citizen might possibly be considered a breach of patriotic duty. The United States Department of State has followed this procedure, notably in the case of naturalized Russians and Turks. The principle was favored by the United States-Spanish Mixed Claims Commission of 1871,[8] in the case of La Coste before U. S. Mex. Comm. of 1868;[9] and in the case of Gautier (U. S.) *v.* Mexico, July 4, 1868[10]

3.

Fraudulent or Exorbitant Claims.

When fraud is discovered in advance, a Department of State will not aid the claimant. This rule is admirably stated by Mr. Seward, Secretary of State of the United States, in a note to Lord Lyons, British Minister, May 30, 1862,[11] and again by Mr. Frelinghuysen, Sec. of State[12] as follows:

6 Moore's Arbitration, 2480, 2481 and 2482.
7 Moore's Arbitration, 2482, 2543-2545.
8 Moore's Arbitration 2562.
9 Moore's Arb. 2561.
10 Moore's Arb. 2450.
11 MS. Notes to Great Britain, IX, 187.
12 To Mr. Suydam, Sept. 25, 1882, cited in report of Mr. Bayard, Sec. of State, to the President, on the case of Antonio Pelletier, Jan. 20, 1887, For. Rel. 1887, 606.

"It may be here observed that this Government exercises a broad discretion in determining what claims it will diplomatically present against other nations. It has not lent, and will not lend, its influence in favor of fraudulent claims. And when in behalf of an individual this Government demands of another power payment of money, it should not close its doors against an investigation into the question whether the apparent title of the claimant to the money is valid, or, because of his own fraud, is void. Were the case reversed this Government would contend for that right. Any other doctrine must impair the dignity and imperil the rights of those who have honestly obtained American citizenship."

If the fraud is only discovered after the awards have been made, the claimant's government will, in accord with good international practice, set aside the awards and refund any moneys received to the other government. All the awards that the United States-Venezuelan Commission of 1866 received were set aside on the ground of the fraud of the Arbitration Commission.[13]

It is believed that a claim which is on its face exorbitant might well, in the interests of good international practice, be placed in the same category as fraudulent claims and be denied the support of the government of the claimant.

4.

Malice and Negligence.

Malice and negligence, in their effect in international law, are in the same class as fraud. "To international claims the rules of general jurisprudence in this relation apply as follows: A party to a malicious wrong cannot recover from another for damages therefrom resulting to himself. A person whose negligence is the immediate cause of a negligent injury to himself cannot recover from another damages for such injury."[14]

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13 Moore's Arb. 1659. For other cases in point see Moore's Arb. 1255-1266; 13 Stat. L. 595; 16 Stat. L. 633; 15 Stat. L. 444; 20 Stat. L. 777; Moore's Arb. 1342; 18 Stat. L. 70; S. Ex. Doc. 52, 43d Cong. 1st Sess.; and Moore's Arb. 1324-1340.

14 Wharton, Int. Law Digest, Sec. 243, II, 700.

In judging of the effect of negligence the rule of comparative negligence is applied. This is more in accord with the Civil Law than the Anglo-Saxon Law.

5.

Evasion of National Duties, and Particularly of Military Service.

Deserters from the army will, of course, lose the protection of their home government.

As Halleck has said, "the right of voluntary expatriation exists only in time of peace and for lawful purposes," and the United States would probably not recognize attempts of its citizens to take on Mexican citizenship in order to avoid military duty; but would, nevertheless, refuse diplomatic protection to a citizen who had made such an unpatriotic attempt to avoid his duties as a citizen in times of national peril. "The reflection is a very obvious one, that in such a crisis a good and loyal citizen might be expected to be at home in the United States and co-operate with his fellow citizens in maintaining the government against domestic enemies, rather than to be residing abroad and evoking aid to protect claims of his own for redress of injuries which he may have suffered when domiciled amid the perils of foreign revolution."[15]

The fact that the claimant is a naturalized citizen who has maintained a permanent domicile in the foreign country for years, should weigh heavily against him in seeking the aid of the country of his naturalization.

6.

Breach of the Local Law.

The rule is universally accepted that an injury resulting from a breach of the local law will result in a complete or partial forfeiture of the protection of the home government. The alien government usually insists only on a fair trial and the infliction of no unusual or disproportionate punishments.

15 Mr. Seward, Sec'y. of State, to Mr. Marsh, May 7, 1863, For. Rel. 1863, Part II, p. 1067.

7.

Breach of International Law.

Borchard claims that individuals, in a qualified sense, are subjected to international duties, although international law is generally considered to govern nations alone.

The carrying of contraband, resistance to the right of visit and search, or similar violations of a belligerent right possible only in time of war, are punishable by the aggrieved nation, and the individual by his act forfeits the protection of his home state. The penalty imposed is generally confiscation of the property involved.

8.

Breach of National Law.

It is a general principle of international law that a citizen who violates his national law must take the consequences, and is deprived of the diplomatic protection of his government when he is abroad. But the decision whether or not the citizen shall have forfeited his rights is entirely in the hands of his home government; and if that government cares to protect him and further his claim, it is no defense for the defendant government to assert that the claimant has violated his national law.[16]

9.

Trading With the Enemy or Prohibited and Unlawful Trading.

Citizens of the United States and of the other allied powers who resided in Mexico during the Great War and engaged in trade with the Central Powers, might very well be denied the diplomatic protection of their home governments on the ground that their conduct in so trading was a violation of law during time of national peril. As to citizens of the United States, it was not unlawful for them to trade with the Central Powers until war was declared by the United States.

16 For cases see Borchard Dip. Prot. Cit. Abr., p. 747.

10.

The Effect of Declarations of President Taft and President Wilson on the Liability of the Mexican Government.

It is a positive rule of international law, that the alien claimant who seeks redress through his home government for injuries occasioned him in a foreign country, though he may have been greatly injured, and unquestionably treated with injustice, by the government of domicile, may be deprived of his international remedy through culpability and contributory negligence on his own part. Acts of culpability are discussed elsewhere in this chapter. Acts of negligence are governed, in general, by the universally accepted rules of private law, but the rule of comparative negligence, a rule not applied by the private law of the United States, has been applied in international law. There are some acts of foreigners in Mexico which might be included under the term "negligence" by reason of certain very definite declarations issued, from time to time, by Presidents of the United States pertinent to the Mexican situation. These declarations in their rules regarding negligence might be questioned as binding countries other than the United States, but are undoubtedly very important in defining the negligence of United States citizens in Mexico.

On March 2, 1912, William Howard Taft, President of the United States, issued a proclamation, quoted in full below, which admonished citizens of the United States not to participate in the Mexican revolutionary turmoil, and which gave notice (this part of the proclamation has been italicized) that such participation would be at the peril of the participant, and that no protection would be granted from "the appropriate legal consequences of their acts," unless such consequences violate "equitable justice and humanity and the enlightened principles on international law."

"Proclamation by the President of the United States of America Regarding Disturbances in Mexico.

March 2, 1912.

(No. 1184.)

Whereas serious disturbances and forcible resistance to the authorities of the established Government exist in certain portions of Mexico; and

Whereas under these conditions it is the duty of all persons within the jurisdiction of the United States to refrain from the commission of acts prohibited by the law thereto relating and subversive of the tranquillity of a country with which the United States is at peace; and

Whereas the laws of the United States prohibit under such circumstances all persons within and subject to their jurisdiction from taking part contrary to said laws in any such disturbances adversely to such established government; and

Whereas by express enactment if two or more persons conspire to commit an offense against the United States or any act of one conspirator to effect the object of such conspiracy renders all the conspirators liable to fine and imprisonment; and

Whereas there is reason to believe that citizens of the United States and others within their jurisdiction fail to apprehend the meaning and operation of the applicable laws of the United States as authoritatively interpreted and may be misled into participation in transactions which are violations of said laws and which will render them liable to the severe penalties provided for such violations;

Now, therefore, in recognition of the laws governing and controlling in such matters as well as in discharge of the obligations of the United States towards a friendly country, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties;

I, William Howard Taft, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of such laws

the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same; and finally *I do hereby give notice that all persons owing allegiance to the United States who may take part in the disturbances now existing in Mexico, unless in the necessary defense of their persons or property, or who shall otherwise engage in acts subversive of the tranquillity of that country, will do so at their peril and that they can in no wise obtain any protection from the Government of the United States against the appropriate legal consequences of their acts, in so far as such consequences are in accord with equitable justice and humanity and the enlightened principles if international law.*[17]

In Testimony Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 2nd day of March, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-sixth.

WM. H. TAFT.

By the President:

Huntington Wilson,
Acting Secretary of State."[18]

This declaration clearly places participants or abettors in the same category as the revolutionists, insurrectionists or brigands, whom they have aided, and withdraws from them the protection of the United States Government, provided they are treated in accordance with the standards of treatment established internationally as proper for the particular group they have assisted.

In the following excerpt from an address on Mexican Affairs delivered by President Woodrow Wilson before the Congress of the United States, on August 27, 1913, the President seems to have served notice on citizens of the United States who did at that time, or intended during the continuance of the Mexican turmoil to reside in or visit the Republic of Mexico, that al-

17 Italics not in the original.

18 May be found in Amer. Jour. Int. Law, Vol. VI, Supp. 1912, p. 146.

though the United States Government would protect such of its citizens as could not avoid their presence in Mexico, those who stayed or visited, when doing so could fairly have been avoided, would be guilty of a variety of contributory negligence.

> "While we wait, the contest of the rival forces will undoubtedly for a little while be sharper than ever, just because it will be plain that an end must be made of the existing situation, and that very promptly; and with the increased activity of the contending factions will come, it is to be feared, increased danger to the noncombatants in Mexico as well as to those actually in the field of battle. The position of outsiders is always particularly trying and full of hazard where there is civil strife and a whole country is upset. We should earnestly urge all Americans to leave Mexico at once, and should assist them to get away in every way possible—not because we would mean to slacken in the least our efforts to safeguard their lives and their interests, but because it is imperative that they should take no unnecessary risks when it is physically possible for them to leave the country. We should let every one who assumes to exercise authority in any part of Mexico know in the most unequivocal way that we shall vigilantly watch the fortunes of those Americans who can not get away, and shall hold those responsible for their sufferings and losses to a definite reckoning. That can be and will be made plain beyond the possibility of a misunderstanding."[19]

Borchard, in his "Diplomatic Protection of Citizens Abroad," page 740, in discussing proclamations of Presidents Taft and Wilson, says: "We are not concerned with the various proclamations of presidents, such as the recent proclamations of Presidents Taft and Wilson prohibiting the exportation of arms into Mexico, by which the obligations of neutrals have been increased in the interests of public policy and the peace of contiguous neighbors. Violation of such a proclamation would incur all the penalties of a violation of national law together with a forfeiture of diplomatic protection."[20]

19 From Address of President Wilson on Mexican Affairs before Congress, August 27, 1913, Supplement Vol. VII, Amer. Jour. Int. Law, p. 283.

20 Page 740, Citing U. S. v. Chaves, 228 U. S. 525.

II.

Unneutral Conduct or Unfriendly Acts.

(a) Unlawful Expeditions.

On April 22, 1793, Washington issued his famous neutral proclamation in which he declared that no citizen would be protected against punishments imposed under the law of nations by "committing, aiding or abetting hostilities against any of the state (belligerent) powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations."

The U. S. Revised Statutes, secs. 5281-5291, now make it a Federal offense to aid belligerents in specified ways.[21]

(b) Unneutral Military and other Acts of Service to Foreign Countries or Belligerents.

Most states do not prohibit their citizens from taking on military service in foreign countries; but in such cases they impose the penalty of an almost complete loss of the right to protection. Great Britain has made punishable by fine and imprisonment enlistments of its citizens for military service against a nation "at peace with Her Majesty."

The measure of protection which an enlisting citizen will retain, provided he has not by oath completely expatriated himself, will generally be as follows: (1) his treatment must not be inhuman; (2) the rules of war must not be violated to his prejudice if he is captured in a foreign army; (3) he must not be discriminated against as compared with other aliens on account of his nationality. "American citizens who implicate themselves in foreign revolutions have a very weak title to national protection, available only to prevent a flagrant or harsh violation of their persons through unusual forms of punishment."[22]

The Mexican law, which puts Mexican citizenship upon a foreigner who enlists in the Mexican army, has been interpreted

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21 For cases of expeditions started or organized in the United States and held to be illegal and relieving the participants of the protection of the United States Government, see Borchard Dip. Prot. Cit. Abr. Secs. 361, 362, 363.

22 Borchard Dip. Prot. Cit. Abr., p. 769; see also, Sec. 364.

by the United States as depriving a citizen of the United States of his previous citizenship *pro tempo* and until he re-establishes his United States citizenship by returning to the United States.[23]

As witnessed by the statute mentioned above some countries, notably Great Britain, have at times favored a harsh interpretation of this rule. But Great Britain successfully pressed the claim of one of her citizens for military services rendered Brazil.[24] The practice, however, of pressing claims for military services rendered abroad is exceptional and apparently not good international procedure.[25]

Other services rendered during a war in which the country of domicile is engaged might be such as to deprive the foreigner of his home government's protection. Shipbuilding, under such circumstances, barred a claim against Peru,[26] as did engineering projects in Mexico,[27] acting as agent for a confederate state,[28] and the giving of other services to the confederacy.[29] "Too great a degree of political activity in a foreign country often entails a waiver of national protection; and when it involves identification with armed factions, forfeits neutral protection."[30]

Unfriendly acts against a foreign government, generally infringements of the local law of the country of residence, usually lead to repressive measures by that state, and the foreigner who has committed such acts will not be protected if no unusual cruelty or harshness becomes apparent. Such unfriendly acts might include, among others, offensive publications, inciting natives, obnoxious inter-mixture in local politics, and sympathizing too actively with bandits and insurgents.

Furnishing combatants with supplies and other aid is a violation of neutrality operating to forfeit neutral position.[31] The

23 See Moore's Arb. 2753, 2390, 2467 and 2756.

24 Moore's Arb. 2107, 2108.

25 See Mr. Blaine, Sec. of State to Mr. Patterson, April 7, 1890, 177 MS. Dom. Let. 180 and Mr. Sherman, Sec. of State, to Mr. Rodriquez, No. 14, April 20, 1897, For. Rel. 1897, 331; and same to Mr. Coxe, No. 71, April 21, 1897, id. 332.

26 Heuver v. Peru, Moore's Arb. 1650.

27 Fitch (U. S.) v. Mexico, Moore's Arb. 3476.

28 Whity (Gr. Br.) v. U. S., Moore's Arb. 2823.

29 Eakin (Gr. Br.) v. U. S., Moore's Arb. 2819.

30 Borchard Dip. Prot. Cit. Abr. 779.

31 See Kennett v. Chambers, 14 How. 38; Hargous (U. S.) v. Mexico, Moore's Arb. 1280-83; Sturm v. Mexico, Moore's Arb. 2756, 2757, cases in Moore's Arb. 2756-2757, and Mr. Fish, Sec. of State to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453.

furnishing of money and arms is clearly such unneutral conduct.[32] But if these were furnished under duress the rule would not apply. Many foreigners in Mexico were forced by Palaez and other bandit or revolutionary leaders to furnish money and payment under the physical or moral duress present in most of these cases would not constitute unneutral conduct.

"In several cases [before the Spanish Treaty Claims Commission] there was testimony tending to show that the claimants had sympathized with the insurgents in their struggle against Spain; but it was difficult to prove positive acts of hostility to the Spanish Government. In the case of Caldwell, No. 283, the claimant admitted voluntary enlistment and service with the Cuban forces; and his claim for property losses was dismissed on final hearing. Likewise one of the claimants in Jova, No. 122, admitted service in the Cuban Army; and redress for property losses was denied him. In Iznaga, No. 111, the claimant, with the consent of the Spanish authorities, paid to the insurgents certain amounts for permission to remove his cattle from his estates. The evidence showed that he was unable without this permission or without the protection of the Spanish troops to remove his cattle. He was not for these payments denied a standing before the Commission. The claimant in Bauriedel, No. 239, likewise received an award, although the evidence showed a contribution by him of $2,500 to the Cuban Junta for permission to remove lumber from the interior of the island. According to the testimony of the claimant this payment was made only after advising with the American Consul-General and solely in order to save the lumber which the insurgents had prevented him from removing."[33]

(c) Acts "In Aid and Comfort."

Such acts forfeit the protection of the home government. Borchard[34] summarized acts which constitute giving "aid and comfort" getting his material from the decisions of commissions

32 Rivas y Llamar (U. S.) v. Spain, Moore's Arb. 2781. See also Moore's Arb. 2931, 1613-14, 2771, 2780 and 3305.

33 Samuel B. Crandall, "Law Applied by Spanish Treaty Claims Commission," Vol. IV, Amer. Journ. Int. Law, p. 822.

34 Dip Prot. Cit. Abr., pp. 788-791.

and other tribunals, sitting on international law questions. Among other acts cited as "aid and comfort" are the following: Standing guard over prisoners for the enemy; aiding the enemy in defense; commercial transactions with the confederacy; dealing in blockaded goods; subscription to a confederate loan; selling saltpetre to the enemy, and selling munitions to the confederacy.

In view of the World War situation, the rules of this subject are very important when claims of the United States and other recently allied citizens are being considered. It is, of course, entirely in the hands of the home government to decide whether or not its citizens have given "aid and comfort" to the enemy and so deprived themselves of the right to protection.

The "aid and comfort" must be voluntary, of course.

12.

Acts Against Public Policy.

A diplomatic claim will not be made which is based on an act against public policy. "Diplomatic aid will not be rendered to press on a foreign government a claim which is based on an act against public policy.[35]

35 Mr. Seward, Sec. of State, to Mr. Whitney, July 24, 1868, 79 MS. Dom. Let. 119.

CHAPTER VI.

THE MEASURE OF DAMAGES.

The rules regarding the measure of damages which apply in private law, do not entirely govern international claims. In international law the important factors in measuring damage are whether they are *proximate* or *remote*, and whether they are reasonably certain and direct or *speculative* and consequential. The arbitrators of the Alabama claims refused to allow damages arising out of (1) the loss due to the transfer of the British Flag to the American Merchant Marine, (2) the enhanced payment of insurance and (3) the prolongation of the war and the addition to the cost of war of the suppression of the revolution. "Prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature on future and uncertain contingencies," said the arbitrators.[1] This precedent has been followed in cases too numerous to list, and undoubtedly fixed a rule of International Law.[2]

The rule has been followed by Acts of Congress of the United States in organizing commissions to make international damage awards. International commissions have consistently denied speculative, conjectural and remote damages.[3]

Claims for indirect damages are sometimes allowed when it is fairly clear that they are certain and not speculative, imaginative and incapable of computation.[4]

Future profits will be allowed in computing the value of a franchise or concession which has been arbitrarily or unlawfully cancelled.[5]

Expenses incurred in presenting and prosecuting claims are often, though not always, allowed as elements of damage.[6]

In some instances damages incidental to the presentation of

1 Moore's Dig. Vol. VI, p. 999.
2 See Borchard's Diplomatic Protection of Citizens Abroad, p. 414, note 2.
3 For authority see: Borchard 415, Notes 1, 2, 3 and 4, and p. 416, Notes 1 and 2.
4 For cases see: Borchard, p. 416, Note 3 and p. 417, Note 1.
5 Borchard, p. 417, Note 2.
6 Borchard, p. 418, Note 1.

a claim have been disallowed on the theory that civil courts do not allow more than the regular court costs.[7]

Generally costs and expenses are considered from an equitable, rather than from a technical point of view.

On the question of general damages, International Law does not follow the theory of Municipal Law which tries to make the injured party entirely "whole."

Punitive or *exemplary damages* have been demanded by the United States and Great Britain in numerous instances where the injury consisted of a violent and inexcusable attack on the lives and property of citizens, where there has been a criminal governmental delinquency, or where the assault was on a consul or some other person with official or semi-official status. However, these cases are almost always ones in which the outrages occurred in undeveloped countries, as in China, Turkey and Persia, and cases warranting a claim for, or the granting of, punitive damages are not very likely to arise against any but such undelevoped nations.

Contract and Tort Claims. The loss of probable profits is more generally compensated in the case of contract claims than in the case of tort claims, on the theory that business profits are within the contemplation of the parties. This theory was expressed by the United States Supreme Court in the frequently internationally cited case of Howard *v.* Stillwell Tool Manufacturing Company.[8]

In cases of breaches of concession contracts the reasonable value of the expected profits of the concession is allowed, together with the amount spent in the construction of the works.[9]

The good-will of a business is not generally estimated by the average annual profits.

In tort cases arbitrators have used a wide discretion in estimating and assessing damages.

Personal Injuries. The commission passing upon alien claims against China arising out of the revolution of 1911 recommended that the rules adopted by the Crown Advocate of the British Gov-

7 Borchard, p. 418, Note 2.
8 139 U. S. 199.
9 May v. Guatemala, Feb. 23, 1900, For. Rel. 1900, 648, 654.

ernment in adjudicating the Boxer claims be followed, namely: in case of partial disablement, there should be obtained, wherever possible, "evidence as to the extent to which the life of the claimant was, from an insurance point of view, damaged; that is to say, the amount of extra premium which an insurance office would demand of the claimant, if otherwise sound, applying for a policy on his life, the extent to which they would 'load' the policy. The sum on which (his) calculation was based being that in which the claimant would naturally, from his position in life, take out a policy if about to marry, (he) then allowed the capitalized value of these extra premia as compensation for the injury received."

In cases of arrest or imprisonment, a wide range of estimate has been employed by arbitrators. Umpire Plumley in the case of Topaze, before the British-Venezuelan commission of 1903, after an examination of some sixteen cases, concluded that $100 per day for unlawful detention seemed the sum most generally acceptable to arbitral tribunals.

Elements that have been considered in determining awards for unjust arrest and imprisonment have been the physical and moral suffering, duration, official character or station in life, the necessary consequences of the detention and such factors.

In cases of tortuous injuries resulting in death, varying elements have been considered in measuring damages.[10]

Interest. No general rule appears regarding the award of interest. It is usually demanded, and sometimes granted.[11]

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10 See Borchard p. 424 and 425.

11 Borchard p. 428, 429.

CONCLUSION.

President Obregon has repeatedly and publicly stated that Mexico will pay her national debts, that payments on the external debt would soon be resumed, and that his Government is prepared to deal fairly with the claims of foreigners for damages sustained during the revolutions. While there exists some doubt in the minds of many persons in the United States and other countries regarding the good faith and the strength of Obregon's Government, the writer is convinced that the United States and the other great nations can well afford to have faith in the promises of the present Mexican regime.

Mexico has passed through a decade of internal strife that has sapped the liquid resources of the country and exhausted the people. The business men and the peons, who form the overwhelming majority of the people, are tired of revolution. There is no revolutionary disposition left. There may in the near future occur local disturbances or even a sudden change in the personnel of the administration, but there cannot come about another great conflagration.

The revolution that began with the overthrow of Diaz found sympathy in the hearts of the Mexican masses. Leaders had no difficulty in drawing to their standards the peons who were landless, propertyless and neglected by the Government. The ten years of revolution really represented one continuous struggle, the upheaval of the peasantry and the masses against the ruling classes. The purpose of the revolution has been accomplished. The Obregon Government purports to be a government not for the privileged few but one of and for the peons. The landed estates of the old regimes are being divided with astonishing rapidity, popular education is being expanded and the peons are coming into their own. The people are revolution weary and are in general satisfied that their present government is not an exploiting government but one which has the interest of the masses at heart.

The writer is personally acquainted with the men who constitute the Mexican Executive group and believes that their sincerity, honesty and good faith is beyond question, that the promises of the Obregon Administration are not idle.

However, despite the good intentions and the integrity of the Mexican Government, Mexico is finding and will find the problems of readjustment exceedingly difficult to solve. She will need the co-operation of her sister nations to satisfactorily solve these problems and an antagonistic attitude on the part of the United States and the other great powers will make readjustment well-nigh impossible and will precipitate whatever revolution Mexico is still capable of supporting. On the other hand, if these nations assume toward Mexico an attitude of friendly assistance, the day will be hastened when Mexico can emerge from her trying condition and can take that place among the nations which her wonderful resources warrant. Mexico's immediate problem is purely an economic one and not, as is so commonly believed, a political one.

One of the lessons of the Great War is that the strong nations cannot isolate themselves and observe with indifference and disinterest an unsettled condition in some foreign part of the world. Modern means of communication are drawing the nations of the earth closer together and at the present time no nation can afford to hold itself aloof from world affairs. It is not only to the self-interest of every state to do its utmost to induce and maintain a condition of stability all over the world, but it has become a duty of the enlightened nations to lend a helping hand to a sister nation in difficulty.

It is submitted that if the United States and the other nations will adopt a course of friendly co-operation toward Mexico at this time, Mexico will quickly respond, perform her just obligations with the maximum despatch and enter into a new phase of national prosperity in which the world will profit.

* * * * * *

Since the above was written, namely on May 27th, 1921, President Obregon issued a statement to the United Press relative to recognition of the Mexican Government by the United States.

This statement confirms the expressed opinion of the writer that Mexico acknowledges and intends to perform all of the obligations imposed upon her by International Law.

The statement follows:

"Replying to your telegram of yesterday relative to a story published by the press to the effect that the Government of your country may demand signature of a protocol preliminary to granting recognition to the Mexican Government, *it is my opinion that a treaty should not exist previous to recognition, since the rights and obligations of Mexico, like those of all other countries, are established with all regard for international law*, and that there is no necessity for a treaty in order that Mexico should recognize those obligations, establishing them anew.

"Mexico believes that she has the right to be considered as any other of the nations which are subject to the rules of international law. *The United States of America, like any other country, may ask for its nationals all the guarantees and prerogatives that international law confers, without the necessity that they should be ratified in a protocol, and Mexico neither evades nor will evade in any way whatsoever any of the obligations which are hers as an independent nation.*

"Moreover, Mexico does not demand renewal of friendly relations with those nations which still doubt the stability of her Government and her firm resolve to comply with all her obligations; and those countries may take all the time that their foresight and interests warrant for the renewal of relations when they may believe it convenient.

"I am certain that the high personalities who now administer your country, interpreting the noble desires for harmony which are being strengthened with the passing of each day, will avoid renewal of relations between both nations on a basis which in any way affects the rights and sovereignty of the Mexican people. This is the only condition under which the Government of this Republic desires renewal of relations with those countries where they are at present interrupted."

This book has been an effort, as far as claims of foreigners against Mexico are concerned, to define "the rights and obligations of Mexico" as "established with all regard for International Law."